Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the trial court applied the well-established standard in the Federal Circuit and, in 2001, ruled at summary judgment that because the United States Forest Service ("FS") had acted unreasonably both in imposing and prolonging a suspension of Precision Pine & Timber, Inc.'s ("Precision") operations on 11 timber sale contracts, the FS had breached its implied contractual duties to cooperate and not to hinder Precision's performance. Following lengthy discovery proceedings and a six week trial on damages, judgment was entered in favor of Precision. The government appealed and, in a 2010 ruling, a panel of the Federal Circuit disregarded binding Circuit precedent and created a new standard of proof for a breach of the implied duties, *i.e.*, one adopted from a misapplication of the sovereign acts doctrine. The Federal Circuit now requires contractors to establish a breach of the implied contractual duties to cooperate and not to hinder by demonstrating that the government acted with subjective intent to deprive the contractor of benefits to which it was entitled under the contract. The questions presented are:

1. Whether the Federal Circuit erred by creating a defense to breach of the implied contractual duties under the sovereign acts doctrine that is at odds with the two-part test established by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality), that has been adopted as the test for application of the doctrine by the Federal Circuit?

2. Whether the Federal Circuit erred by failing to apply its own, binding, objective reasonableness

standard for determining whether the government had breached its implied contractual duties and instead adopted a new legal standard requiring a contractor to prove that the government had a subjective intent to breach its implied contractual duties?

3. If questions 1 and 2 are answered in the negative, whether the Federal Circuit erred when it reversed the trial court's finding of a breach of contract at summary judgment under the reasonableness standard, but did not remand the case to the trial court to allow the contractor an opportunity to establish facts necessary to prove its breach claim under the newly announced, subjective intent standard?

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Precision Pine & Timber, Inc., makes the following disclosures:

There are no parent corporations or any publicly held companies owning 10% or more of Petitioner's stock.

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JURISDICTION

The Federal Circuit entered judgment on February 19, 2010 (Pet.App.152a-153a) and denied Precision Pine & Timber, Inc.'s ("Precision") combined petition for rehearing and rehearing *en banc* on June 10, 2010. Pet.App.136a-137a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the following relevant constitutional amendment, statutes and regulations: U.S. Const. amend. V, Endangered Species Act 16 U.S.C. § 1536(a)(2), 16 U.S.C. § 1536(b), National Forest Management Act, 16 U.S.C. § 1604(f)(5), 16 U.S.C. § 1604(i) and 50 C.F.R. § 402.14(e)(1995).

STATEMENT OF THE CASE

It had been settled law for decades in the Federal Circuit that a federal contractor could establish that the government breached its implied contractual duties by demonstrating that the government's action(s) in causing and/or prolonging a contract suspension were objectively unreasonable. Indeed, in

recent years, the Federal Circuit had reaffirmed the applicability of the reasonableness standard in a case addressing government suspensions under a contractual provision that is substantively indistinguishable from the contractual provision at issue here. However, rather than applying the objective, reasonableness standard that *both* parties had argued governed this appeal, a Federal Circuit panel ignored binding Circuit precedent and announced a new standard which required the contractor to prove that the government had *subjectively intended to harm* the contractor in suspending the contractor's operations.[1] In creating its new standard, the panel relied almost exclusively on cases that addressed the sovereign acts defense and *sua sponte* applied aspects of that defense that do not apply to this case. Worse still, the panel applied the defense in a way that is at odds with the two-part test set forth in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality) that has been adopted by the Federal Circuit.[2] In doing so, the Federal Circuit

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[1] Original jurisdiction over government contracts claims arising under the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, is lodged with the Court of Federal Claims and the Boards of Contract Appeals, *id.* at §§ 609,607, and appeals from these tribunals are solely to the Federal Circuit. 28 U.S.C. § 1295. For this reason, a split in circuit authority is unlikely to develop. Where the Federal Circuit has been given essentially exclusive jurisdiction over an area of the law that is of special importance to the entire Nation (such as the law of government contracts), a grant of *certiorari* is particularly warranted. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

[2] Seven justices concurred in the opinion, affirming the Federal Circuit's ruling in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995)(*en banc*). The Federal Circuit has treated the

provided the government with an unprecedented and wholly unwarranted defense to breach of contract claims that threatens to allow the government to escape liability for a host of actions that are unreasonable, if not, in fact, contrary to law.

Moreover, even if this Court were to find no error in the Federal Circuit's creation of a new legal defense to a breach of the implied duty to cooperate, the Federal Circuit's refusal to remand the case so that Precision could have an opportunity to prove a breach of its contracts even in the face of this new defense violates both plaintiff's right to due process and the law of this Court. Review by this Court is warranted.

BACKGROUND

Between June 24, 1991 and July 20, 1995, the United States Forest Service ("FS") publicly offered and awarded to Precision 14 timber sale contracts located on National Forests in Arizona. Pet.App.41a n.1. Section 7(a)(2) of the Endangered Special Act ("ESA"), 16 U.S.C. §§ 1531 et seq., provides that each federal agency shall, in consultation with the United States Fish and Wildlife Service ("FWS"), insure that

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plurality opinion in *Winstar* "as setting forth the core principles underlying the sovereign acts doctrine." *Conner Bros. Constr. Co., Inc. v. Geren*, 550 F.3d 1368, 1374 (Fed. Cir. 2008) (applying two-part *Winstar* test), *citing Carabetta Enters., Inc. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (same), and has applied the two-part test established by the plurality opinion in *Winstar* "as the current understanding of the sovereign acts doctrine in the Federal Circuit." *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009), rehear'g *en banc* filed November 20, 2009 pending.

their actions are not likely to jeopardize the continued existence or adversely modify the critical habitat of a listed species. 16 U.S.C. § 1536(a)(2). Pet.App.138a. This requirement notwithstanding, upon the listing of the Mexican spotted owl ("MSO") in March 1993, the FS Region 3 refused to submit its existing Land and Resource Management Plans ("LRMP")[3] for consultation with FWS. Indeed, it refused to do so until a federal district court ordered it to consult in August 1995. Pet.App.47a-59a, 121a-124a. At that time, the district court also directed Region 3 to suspend all timber harvesting authorized by those LRMPs until the required consultations were completed. Pet.App.63a. As a result, on August 25, 1995, the Region suspended the 14 timber sale contracts held by Precision, 10 of which had been awarded after the listing of the MSO in March 1993. Pet.App.41a n.1.

Furthermore, even though consultation under the ESA was to have been completed within 135 days, as a result of the FS's "misbehavior" (*see* Pet.App.22a), it took 467 days to complete consultation, during which time Precision's contracts remained suspended. Pet.App.126a.

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[3] "Activities, including timber sales, in National Forests are governed by the LRMP for each forest." Pet.App.471, *citing* National Forest Management Act (16 U.S.C. § 472(a); §§ 1600 *et seq.* ("NFMA")) at 16 U.S.C. § 1604(f)(5). Pet.App.142a. "Each timber sale offered by the Forest Service must be 'consistent' with the LRMP for the National Forest on which it is located." *Id.*, *citing* 16 U.S.C. § 1604(i). Pet.App.143a. Thus, until the FS had a valid LRMP in place by completing consultation, it could not proceed with timber sale contracts.

Shortly before the MSO was listed in 1993, environmentalists had sued the FS regarding its failure to submit LRMPs in Oregon for consultation following the listing of another species under the ESA. *See Pac. Rivers Council v. Roberston*, 854 F. Supp. 713, 723 (D. Or. 1993). The Oregon district court, following the Ninth Circuit's controlling decision in *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992), ruled that LRMPs were agency actions for which the FS was obliged to consult whenever a new species was listed. *Id.* This ruling confirmed that, upon the listing of the MSO, Region 3 was required by the ESA to have submitted all of its LRMPs to FWS for consultation. Pet.App.53a.[4]

On December 10, 1993, environmentalists in Arizona advised the Region that, based on *Lane County* and the district court's ruling in *Pacific Rivers*, they planned to bring suit regarding Region 3's failure to submit its LRMPs for forests located in Arizona for consultation following the listing of the MSO. Pet.App.53a-54a. Rather than submit its Arizona LRMPs for consultation, the FS appealed the ruling in

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[4] At summary judgment, Precision contended that the ESA itself required the FS to submit its LRMPs to FWS for consultation upon the listing of the MSO. Pet.App.119a. Alternatively, Precision argued that the FS's duty to consult became manifest when, on March 4, 1992, *Lane County Audubon Soc'y v. Lujan*, 958 F.2d 290, 295 (9th Cir. 1992), held that the FS's sister agency, the Bureau of Land Management ("BLM"), was required to submit aspects of its timber management plans for consultation upon the listing of a new species under the ESA. *Id.* The ruling in *Lane County* came more than one year before the MSO was listed and was the law in the states comprising the Ninth Circuit, including the state of Arizona where all of the timber sales at issue are located. *See id.*

Pacific Rivers to the Ninth Circuit. Pet.App.54a. However, on July 7, 1994, the Ninth Circuit affirmed that LRMPs must be submitted for consultation upon the listing of a new species under the ESA. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-56 (9th Cir. 1994).[5]

In reaction to *Pacific Rivers* and *Lane County*, other Regions of the FS submitted their LRMPs for consultation. Pet.App.57a. However, FS Region 3 continued to resist doing so. Pet.App.58a-59a. As a result, on August 8, 1994, environmentalists filed suit against FS Region 3. *See Silver v. Babbitt* ("*Silver*"), 924 F. Supp. 976 (D. Ariz. 1995). In the face of this lawsuit, Region 3 still refused to submit its LRMPs for consultation and continued to award timber sale contracts under the authority of those LRMPs. Pet.App.59a-60a. These actions were taken contrary to Department of Justice ("DOJ") advice that the Ninth Circuit's ruling in *Pacific Rivers* governed and therefore that the FS was required to engage in consultation on its LRMPs. *Id.* Indeed, DOJ thought so little of the FS's position in *Silver* that it advised the FS that its continued failure to follow the law and engage in consultation was so at odds with applicable law that continuing to defend the FS could expose DOJ attorneys to sanctions under Federal Rules of Civil Procedure 11. Pet.App.59a-60a.

Faced with Region 3's unwavering refusal to comply with the ESA, on August 24, 1995, the Arizona District Court in *Silver* ordered the Region to engage

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[5] Seven of the 14 sales at issue were awarded to Precision after the Ninth Circuit's decision in *Pacific Rivers*. Pet.App.41a n.1.

in consultation and directed the agency to suspend all timber harvesting that had been authorized pursuant to those LRMPs until consultation was complete. Pet.App.62a-63a.

Despite knowing that timber sale contracts awarded under the LRMPs could not proceed until the consultation was complete and that this delay was having devastating effects on contractors in Region 3, specifically including Precision, the FS repeatedly attempted to thwart the consultation process, which caused further delay. Pet.App.63a-65a, 67a-77a.[6]

As a result, in 1997, Precision submitted certified claims pursuant to the Contract Disputes Act, 41 U.S.C. § 605, alleging breach of the 14 contracts and detailing millions of dollars of damages that it had sustained during the 16-month suspension. Pet.App.77a. In response, the contracting officers awarded Precision a total of $18,242.72, which they believed were owed under the terms of the contract and denied Precision's claims for breach of contract damages. *See* Pet.App.78a.

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[6] Consultation on the LRMPs took 467 days because, among other things, the FS delayed commencing formal consultations, attempted to evade the orders of the district court about the scope of consultation (for which it was threatened with contempt) and tried to unilaterally declare the injunction to be over, even though it had not completed consultation as ordered by the district court. Pet.App.126a. As the district court found, the FS was the "culprit" in a process that had taken far too long and was paralyzing the local timber industry. *See* Pet.App.74a-75a.

PROCEEDINGS BELOW

Precision timely appealed the contracting officers' denials of its breach of contract claims to the Court of Federal Claims ("COFC") as provided for in the Contract Disputes Act, 41 U.S.C. § 609(a). Upon cross-motions for summary judgment, on July 30, 2001, the COFC found that, although the FS had contractual authority to suspend a contract in certain circumstances, here, the suspension was caused by FS fault and was, therefore, unreasonable; and the duration of the suspension was unreasonably prolonged by actions of the FS, both of which breached the government's implied contractual duty not to hinder performance for 11 of the 14 contracts. Pet.App.125a-130a.

Following a six week trial on damages and extensive post-trial briefing, on May 2, 2008, the trial court entered judgment in Precision's favor in the amount $3,343,712. *Precision Pine & Timber, Inc. v. United States*, 81 Fed. Cl. 733 (2008). The government appealed the case on several grounds, including challenging the trial court's ruling on liability on the basis that the government was entitled to a presumption of "good faith" in the performance of its duties that must be applied before a breach of the government's implied duties may be found. In response, Precision argued that the government, when acting in its contractual capacity, was not entitled to any presumption of good faith and that the FS's suspension had been unreasonable and a breach of the government's implied contractual obligations under Federal Circuit precedent. *See* Pet.App.11. The Federal Circuit adopted neither party's position. Instead, on February 19, 2010, it reversed the COFC's

2001 liability ruling and, without discussing the reasonableness standard, ruled *sua sponte* for the government as a matter of law because the FS's actions which caused and prolonged the suspension were not "specifically targeted" at Precision's contracts and did not "reappropriate any benefit guaranteed by the contracts." Pet.App.23a.[7]

Precision timely filed a combined petition for panel rehearing and rehearing *en banc* and the Federal Circuit requested that the government respond to the petition. *See* Pet.App.150a. On June 10, 2010, the Federal Circuit denied Precision's petition. Pet.App.136a.

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[7] The Federal Circuit also reversed the COFC's ruling finding that the government had breached a warranty contained in the contracts. Pet.App.19a. Although Precision disagrees with that ruling, it does not seek review of that ruling by this Court.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit Erred By Creating A Government Defense Adopted From The Sovereign Acts Doctrine That Is At Odds With This Court's Plurality Decision In *Winstar* And Conflicts With Circuit Precedent[8]

A. Precision's Allegations That The FS Breached Its Implied Contractual Duties By Unreasonably Causing And Prolonging Suspensions Of Precision's Contracts Did Not Implicate The Sovereign Acts Defense

Precision alleged that both by causing the suspension through its unreasonable failure to submit its LRMPs for consultation as required by the ESA and then by prolonging the suspension by its unreasonable actions during consultation, the FS breached its implied contractual duties to cooperate and not to hinder Precision's performance. It is well-established in the Federal Circuit that:

> Every contract, as an aspect of the duty of good faith and fair dealing, imposes an implied obligation "that neither party will do anything that will hinder or delay the other party in performance of the contract." *Luria Bros. v. United States*, 177 Ct. Cl. 676, 369 F.2d 701, 708 (1966); *see Malone v. United States*, 849

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[8] Professor Nash described the ruling as creating a new, "mini-sovereign acts" defense. *See* Ralph C. Nash, Jr., "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 Nash & Cibinic Report, No. 5 at 67.

> F.2d 1441, 1445, *modified* 857 F.2d 787 (Fed.Cir.1988); *Restatement (Second) of Contracts* § 205 cmt. d (1979).

Essex Electro Eng'rs., Inc. v. Danzig, 224 F.3d 1283, 1291 (Fed. Cir. 2000).[9] When the government is a contracting party, these implied duties apply just as they would with a private party. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir. 2003). The implied duties to cooperate and not to hinder are as binding on the parties as if they were expressly written into the contracts. *Kehm Corp. v. United States*, 93 F. Supp. 620, 624 (Ct. Cl. 1950). A claim that the government breached the implied covenant of good faith does not require a showing of bad faith. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 770 (2005) ("[I]t is clear, particularly when the specific aspects of the duties to cooperate and not to hinder are at issue, that proof of fraud, or quasi-criminal wrongdoing, or even bad intent are not required"). The implied duties do require, however, that the government refrain from hindering the contractor's performance, and that it do whatever is necessary to enable the contractor to perform. *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977) (citation omitted).

In assessing whether a party to a government contract has violated its implied contractual duties, the Federal Circuit has consistently applied a reasonableness standard. *E.g.*, *Essex Electro. Eng'rs.*,

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[9] The Federal Circuit has adopted the opinions of its predecessor, the Court of Claims, as binding law in the Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (*en banc*).

224 F.3d at 1291 (A party must refrain from doing "anything that will hinder or delay the other party in performance of the contract," or that will destroy the "reasonable expectations of the parties in the special circumstances in which they contracted") (citation omitted); *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993) ("government must avoid actions that unreasonably cause delay or hindrance to contract performance") (citation omitted); *O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1982) (applying reasonableness standard to review the actions of the contracting agency which failed to comply with its statutory duties). In fact, in an earlier opinion addressing whether the FS had breached its implied contractual obligations when suspending a timber sale contract pursuant to contract clause C[T]6.01, as it did here, the Federal Circuit specifically ruled that the court must determine whether the suspension was reasonable. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1609 (Fed. Cir. 2003).[10]

B. The Federal Circuit Erred By Misapplying Cases Addressing The Sovereign Acts Defense

In failing to apply the Federal Circuit's objective, reasonableness standard and, instead, adopting a new, subjective "specifically targeted" standard, the panel relied principally upon *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide*

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[10] The contract clause at issue in *Scott* was C6.01 (*see* Pet.App.145a), however, the relevant language of C6.01 is identical to the language in clause CT6.01 (Pet.App.147a) of Precision Pine's contracts. *Precision Pine & Timber, Inc. v. United States*, 63 Fed. Cl. 122, 136 n.8 (2004). The clause will be referred to as C[T]6.01 in this Petition.

Bank v. United States, 431 F.3d 1342 (Fed. Cir. 2005), cases which it deemed to be "prototypical examples" of situations in which implied contractual duties were violated. Pet.App.22a-23a. Both *Centex* and *First Nationwide* involved retroactive legislation (the "Guarini amendment") which repealed certain tax deductions that the contractors obtained under their contracts. In those cases, the government argued that, because Congress' enactment of such legislation was a sovereign act, breach of contract liability was precluded. *See First Nationwide*, 431 F.3d at 1351; *Centex*, 395 F.3d at 1307-08. In both cases, the Federal Circuit properly determined that the sovereign acts defense *did not apply* because the Guarini amendment was not "generally applicable legislation . . . but was specifically targeted at appropriating the benefits of a government contract." *First Nationwide*, 431 F.3d at 1351, *citing Centex*, 395 F.3d at 1308.[11] Although enactment of legislation (or taking any other action) that is specifically targeted at contractual benefits certainly renders the sovereign acts defense inapplicable to a claim that the government breached its implied contractual duties, there is no case law which *requires* what the Federal Circuit held for the first time here, *i.e.*, that specific targeting and reappropriation of benefits must be proven by a contractor to establish that the

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[11] The result in both cases is consistent with the observation that "where the contracting agency breaches an implied obligation, generally the [sovereign acts] doctrine will not afford protection." Ronald G. Morgan, IDENTIFYING PROTECTED GOVERNMENT ACTS UNDER THE SOVEREIGN ACTS DOCTRINE: A Question of Acts And Actors, 22 Pub. Cont. L.J. 223, 258 n.173 (1993).

government breached its implied duties.[12] As has long been recognized by this Court, the reason for this is that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'" *Winstar*, 518 U.S. at 895 n.39, *quoting Cooke v. United States*, 91 U.S. 389, 398 (1875).[13]

C. The Federal Circuit's Ruling Violates Both Prongs Of The Two-Part Test For Application Of The Sovereign Acts Defense In *Winstar*

The sovereign acts defense is designed to balance "the government's need for freedom to legislate [or otherwise perform governmental functions] with its obligation to honor its contracts. . . ." *Winstar*, 518

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[12] The government did not even raise the sovereign acts defense on appeal. Rather, both parties cited *Centex* for its general statement of the law with respect to the implied duties; however, neither party argued that *Centex* required "targeted" government actions before a breach of the implied duties could be found. Neither party cited *First Nationwide*.

[13] The underlying purpose for such parallel treatment is to serve "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883. The Federal Circuit's ruling undermines the government's interests by raising the possibility that the government will be relieved of liability for commercially unreasonable conduct, thereby forcing contractors to increase their bid prices to factor in this contingency *in every contract*. Under the reasonableness standard, the government, like other contractors, was only held liable for breach of its implied contractual duties in those relatively rare situations where its actions did not meet commercially reasonable expectations. *See* Nash, 24 Nash & Cibinic Rep., No. 5 at 67-68.

U.S. at 895. The defense provides that "'the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign.'" *Id.* at 890 (*quoting Horowitz v. United States*, 267 U.S. 458, 461 (1925)). Accordingly, the sovereign acts defense exempts the "[g]overnment as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible." *Winstar*, 518 U.S. at 904. However, as this Court has found, even if the sovereign acts defense applies, *i.e.*, the act in question is public and general and not "specifically targeted" at the contractor, "it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach." *Id*; *see also Carabetta*, 482 F.3d at 1365 (holding that such "additional requirements" include that government performance be objectively impossible or impracticable, *citing*, *inter alia*, RESTATEMENT (SECOND) OF CONTRACTS).

As recognized by the Federal Circuit in this regard, *Winstar* adopted a two-part test for application of the sovereign acts defense: (1) Were the government's actions genuinely public and general in nature, *i.e.*, not "specifically targeted" at the contract in question, but only incidentally fell upon the contract?; *and* (2) Even if the actions were not "specifically targeted," but, rather, were public and general in nature, does the government *also* meet the common-law test for

impossibility of performance? *Carabetta*, 482 F.3d at 1365, *citing Winstar*, 518 U.S. at 895.[14]

i. The FS's Suspension Did Not Satisfy The First Prong Of The *Winstar* Test Because It Was The Result Of The Agency's Failure To Meet Its Legal Obligations

Regardless of whether the FS's actions were "specifically targeted" at Precision, the sovereign acts defense (even in the truncated form adopted by the panel) could still never have relieved the FS of breach liability here because the FS's actions that resulted in its breach of contract were not performed in its sovereign capacity. That is, neither the FS's stubborn refusal to enter into consultation nor its subsequent failure to comply with the 135-day period within which to complete consultation comported with the ESA. In this regard, as this Court has found, quite unsurprisingly, the sovereign acts defense only applies to public and general actions that are "otherwise legal." *Winstar*, 518 U.S. at 898, *citing O'Neill*, 231 Ct. Cl. at 826.[15]

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[14] The Federal Circuit has adopted the plurality opinion in *Winstar*, including the two-part test "as the current understanding of the sovereign acts doctrine in the Federal Circuit." *See supra* note 2.

[15] Stated otherwise, for the sovereign acts defense to apply, the government's performance must be made impracticable *without its fault. . . .*" *Winstar*, 518 U.S. at 904, *citing* RESTATEMENT (SECOND) OF CONTRACTS § 261 (emphasis added). The FS's actions in this case can be described in many ways; however, "without fault" is not one of them.

This Court's reliance upon *O'Neill* exposes a fundamental error in the Federal Circuit's decision. In *O'Neill*, the contracting agency asserted that because its underlying actions "affected all persons . . ., not just the plaintiffs," the sovereign acts defense exempted it from liability "even though such actions may have been contrary to statute." 231 Ct. Cl. at 825. The Court of Claims disagreed and held that, to avoid liability under the sovereign acts defense, "[i]t is critical that the governing acts themselves be legal." *Id.* at 826 (citations omitted). As such, the court not only denied the government's motion for summary judgment but remanded the case to the trial court to answer the following question: "[a]ssuming that there is at least some delay not excused by the sovereign act doctrine," *i.e.*, delay caused by action(s) contrary to the agency's statutory obligations, "whether such delay under the circumstances was unreasonable." *Id.* *O'Neill* notwithstanding, the Federal Circuit erred here by allowing actions which were contrary to the government's statutory duties to constitute the basis for exempting the government from breach liability.[16]

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[16] If action taken by an agency in direct contravention of its statutory obligations can prevent its contractual performance and exempt it from liability for doing so, then the principle that the government is bound by the same rules as private parties when it steps out of its role as sovereign and enters the commercial realm becomes a farce and the saying from previous centuries that the "sovereign can do no wrong" becomes the rule.

ii. The Federal Circuit Also Erred Because The Sovereign Acts Defense Does Not Apply Where The Event That Prevents Performance Was Anticipated By The Parties To The Contract

As noted, even under the sovereign acts defense, in order for the government to obtain discharge from liability, the sovereign action must be "an event the non-occurrence of which was a basic assumption on which the contract was made. . . ." *Winstar*, 518 U.S. at 904, *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). In other words, did the parties anticipate such an act of the sovereign when they entered the contract? Courts considering this precise issue have determined that the parties to standard FS timber sale contracts both foresaw and included standard contract clauses C[T]6.25 (Pet.App.148a-149a) and C[T]6.01 (Pet.App.145a-147a) in recognition of the possibility that the government would need to take actions *required* by the ESA that could affect contract performance. *E.g., Scott Timber Co. v. United States*, 40 Fed. Cl. 492, 508 (1998), *rev'd on other grounds*, 333 F.3d 1358 (Fed. Cir. 2003).[17] That is, clause C[T]6.25 (Pet.App.148a-149a) allows the FS to modify timber sale contracts (something which did not occur here) to add protections for species listed under the ESA, while clause C[T]6.01 (Pet.App.145a-147a) allows the FS to suspend operations to prevent environmental degradation or resource damage. Because contract

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[17] The contracts at issue in *Scott* contained clause C6.25 (*see* Pet.App.148a), while the contracts at issue here contained CT6.25 (R3). Pet.App.149a. The clauses are identical for purposes of this case and will be referred to as C[T]6.25.

clauses C[T]6.25 and C[T]6.01 anticipate that the FS might have to take actions needed *to comply* with its obligations under the ESA that could interfere with contract performance, the non-occurrence of a listing of a new species under the ESA was not an event that was a basic assumption of the contracts.[18] For this reason, the second prong of the *Winstar* test, *i.e.*, the impossibility defense, cannot be established here. *Id.*, *citing Winstar*, 518 U.S. at 906. On this basis alone, the Federal Circuit erred by providing the government with a defense drawn from the sovereign acts doctrine.[19] Accordingly, and as the trial court correctly held, the fact that the FS both caused and prolonged the suspension of Precision's operations precludes the successful invocation of the sovereign acts defense (even in the form utilized by the panel) and constituted a breach for which the government remains liable.

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[18] In its 2001 ruling that was neither challenged by the government nor addressed by the Federal Circuit, the trial court found that the sovereign acts defense did not apply because the government "cannot satisfy the common-law doctrine of impossibility; namely, that it cannot show that the non-occurrence of the suspension of the contracts were a basic assumption of the parties." (Citation omitted). Pet.App.130a-134a.

[19] Had the FS acted *properly* at the time of the listing of the MSO to meet its obligations under the ESA, these clauses may have provided it with authority to modify or suspend the contracts and the Federal Circuit's ruling in favor of the government may have had some validity. Here, however, the delay was the direct result of the FS's *failure to comply* with its obligations under the ESA, something which, of course, was not expressly provided for under the contracts. Nor, as discussed in the preceding section, is the FS's failure to comply with the law something that has ever been deemed to be a sovereign act.

II. The Federal Circuit Also Erred By Adopting A New Standard For Assessing The Government's Breach Of Its Implied Contractual Duties That Conflicts With Binding Circuit Precedent

A. Binding Precedent Required That The Reasonableness Standard Be Used To Assess The FS's Actions In Suspending Timber Contracts Under Clause C[T]6.01

Wholly apart from the fact that the Federal Circuit panel applied the sovereign acts defense in ways that are at odds with this Court's ruling in *Winstar*, the Federal Circuit panel also erred by creating a standard for proving a breach of the implied duty to cooperate that is in direct conflict with binding Federal Circuit precedent.[20] That is, the panel held that, because the

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[20] In the Federal Circuit, "prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*. Where there is direct conflict, the precedential decision is the first." *McMellon v. United States*, 387 F.3d 329, 333 (Fed. Cir. 2004) (citations omitted); *see* Fed. Cir. R. 35(a)(1). As the former Chief Judge emeritus of the Federal Circuit has observed, however:

> The first decision on a legal issue (not the last) is the binding precedent of our court. This procedure prevents intracircuit splits theoretically but not in reality. Because our precedent can be overturned only in banc, which is difficult logistically, a later panel that disagrees with an earlier panel's analysis as applied to its case may skirt around the issue with unhelpful generalities.

Helen Wilson Nies, DISSENTS AT THE FEDERAL CIRCUIT AND SUPREME COURT REVIEW, Am. U. L. Rev. 1519, 1519-20 (Aug. 1996). Here, the panel did not even attempt to skirt around the

contract authorized the FS to suspend contract performance in certain circumstances, for the contractor to establish a breach of the implied duties it was required to show that the FS's underlying actions were "specifically targeted" at it and "reappropriated benefits" it had expected under the contract. Pet.App.23a. The panel's ruling applying a "specifically targeted" standard is in direct conflict with binding precedent of the Circuit in *Scott Timber Co. v. United States*, 333 F.3d 1358 (Fed. Cir. 2003), where the Federal Circuit held that all a contractor need do to prove a breach of the implied duties was to demonstrate that the FS failed to act reasonably in exercising the same suspension authority at issue here.

Both the instant case and *Scott* involved lengthy suspensions imposed by the FS under C[T]6.01, a clause that authorized the FS to suspend contract performance in certain circumstances. Pet.App.93a-96a; 333 F.3d at 1368-70.[21] The prolonged suspensions at issue in *Scott* were imposed to permit the FS to consult with the FWS when the Marbled Murrelet (a seabird that nests in coastal trees) was newly listed under to the ESA. 333 F.3d at 1361. In contrast, here, the suspensions resulted from the FS's refusal to

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issue, but simply failed to address the binding precedent cited by both parties.

[21] Precision does not dispute that the FS had authority under clause C[T]6.01 to suspend contract operations in certain circumstances; however, those circumstances cannot arise where the FS's unreasonable actions, including actions contrary to the agency's statutory obligations, cause and then prolong the suspension.

engage in required consultation until a federal district court ordered it to do so nearly 2½ years after the MSO had been listed.[22] Pet.App.49a-63a. Thereafter, the suspensions were also prolonged by FS "misbehavior" during the consultation process. Pet.App.22a, 63a-77a.

Scott held that, even where the FS properly initiated consultation in response to the new listing of a species under the ESA (something that the FS improperly refused to do here), in order to ascertain whether resulting suspensions imposed under C[T]6.01 constituted a breach of contract, "*the court must determine whether the suspensions were reasonable.*" 333 F.3d at 1368 (emphasis added). The court specifically identified factors to be examined which included: whether the contracting agency had violated any statutory obligations under the ESA, whether the agency had taken all appropriate actions prior to awarding the contracts, and the wisdom of the agency's making award where it had not first met its obligations under the law. *Id.* at 1369.[23]

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[22] Between the April 15, 1993 listing of the MSO and the August 24, 1995 district court order, the FS awarded 10 contracts to Precision. Pet.App.41a n.1.

[23] As the trial court correctly recognized, that the government owed no statutory duties under the ESA directly to Precision does not mean that the manner in which the government met, or failed to meet, its ESA obligations did not affect other legal responsibilities that arise from the contracts. Pet.App.85a. Unlike the situation in *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010), cited by the panel (Pet.App.24a) and other cases such as *D & N Bank v. United States*, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003), cited by the Federal Circuit in *Agredano*, Precision does not seek to *create* any contract rights based on the

It is undisputed in the instant case that the FS's continuing refusal to comply with its consultation obligations under the ESA was completely at odds with the law. Pet.App.85a n.1. Moreover, even the Federal Circuit panel recognized "[t]here is evidence that the [FS] failed to cooperate" during consultation in 1995-1996 by taking actions in violation of a court order. Pet.App.24a. Nevertheless, the panel determined that the FS did not breach its implied duties because, although the FS's misbehavior "during consultation" "violated its obligations under the ESA to the FWS," it was not "specifically targeted" at Precision and did not "reappropriate" to the government any benefit guaranteed by the contracts. Pet.App.23a. In doing so, the panel, without acknowledgement, imposed a new standard for proving a breach of contract that was neither raised nor advocated by either party.[24]

In its ruling, the panel failed to apply, or even discuss, the binding Circuit precedent represented by *Scott*. Instead, the panel concluded that because the

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existence of a statutory or regulatory duty, nor does it seek to equate a violation of such duties with a breach of contract *per se*. Rather, the implied duties at issue are inherent in every contract. Pet.App.3a n.1. As *Scott* correctly recognized, a court should examine the FS's compliance with its statutory duties under the ESA only as part of an analysis of the overall commercial reasonableness of the agency's conduct in order to determine if the FS breached its implied *contractual* duties to cooperate with, and not hinder, its contractor. 333 F.3d at 1369.

[24] In fact, the Federal Circuit went so far as to state that something akin to the "old bait-and-switch" or "double crossing" was necessary before liability for simple breach of implied contractual duties could be established against the government. Pet.App.22a, 23a.

FS's duties under the ESA were not owed directly to Precision, the "incidental effect" which resulted from the FS's non-compliance with them did not violate any implied duties under the contracts. Pet.App.24a-25a. Again, this holding cannot be squared with *Scott*, in which the Federal Circuit held that a factor to be considered in the reasonableness analysis is whether the FS complied with it statutory duties. Moreover, the inquiry upon which this case turns is not whether the FS violated the ESA. In 1995, the District Court in *Silver v. Babbitt* determined that it did. Pet.App.85a n.25. The question here is whether the agency's failure to consult as required by the ESA, the resulting suspension, and further delay caused by the agency's "misconduct" during consultation were commercially reasonable under the circumstances. *See id.*

B. The Panel's Decision Failed To Follow Both Common Law And Federal Circuit Precedent That Require The Use Of The Objective, Reasonableness Standard In Determining Whether The Government Breached Its Implied Contractual Duties

For decades, the law in the Federal Circuit and its predecessor court has been that the implied duty of good faith and fair dealing imposes an obligation on each party to do everything that the contract presupposes should be done by it to accomplish the contract's purpose. *See, e.g., Scott*, 333 F.3d 1358 (Fed. Cir. 2003); *see also Stockton*, 583 F.3d at 1365, *citing* 30 Richard A. Lord, WILLISTON ON CONTRACTS § 77.10 (4th ed. 1999). As other cases have held, a party must refrain from doing "anything that will hinder or delay the other party in performance of the contract," or that

will destroy the "reasonable expectations of the parties in the special circumstances in which they contracted." *Essex Electro. Eng'rs. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (citation omitted). *Accord C. Sanchez*, 6 F.3d at 1542 ("government must avoid actions that unreasonably cause delay or hindrance to contract performance"); *O'Neill*, 231 Ct. Cl. at 826 (applying reasonableness standard to review the actions of the contracting agency that impeded its contract performance and refusing to exempt the agency from liability for incidental, and presumably unintended, consequences where its actions underlying the breach failed to comply with its statutory duties).

The Federal Circuit's case law also conforms to the common law which recognizes that a party to a contract violates its duty of good faith and fair dealing (of which the duties to cooperate and not to hinder are a part) when that party acts unreasonably, or interferes with, or fails to cooperate in the other party's performance. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. (d); 2 E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 8.6 (2nd ed. 1998). Breach of the implied duties can result from "evasion of the spirit of the bargain," "inaction," "slacking off," or "a lack of diligence." RESTATEMENT § 205 cmt. (d). *See* Pet.App.21a (*citing* RESTATEMENT § 205 with approval). *See also* John Cibinic, Jr. & Ralph C. Nash, Jr., ADMINISTRATION OF GOVERNMENT CONTRACTS § 302 (4th ed. 2006) ("Failure to cooperate will be found when the government's conduct during contract performance is unreasonable"). Contrary to the panel's apparent conclusion (*see* Pet.App.24a), no evidence of a specific purpose to harm the contractor or any wrongful motive is required.

Although bad faith may be *sufficient* to establish breach of the implied duties, evidence of bad faith is not *necessary* to establish breach of the implied duties. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 769-72 (2005) (collecting cases). Precision is not aware of any decision of the Federal Circuit prior to *Precision Pine* which holds that to establish a breach of the implied duties, a federal contractor must prove that the agency acted with bad faith, malice or intent to injure the contractor. The new standard imposed by the panel is a vast departure from accepted common law standards, is contrary to the Circuit's own binding precedent, and cannot stand.

C. Contrary To The Panel's Conclusion, Both The Suspensions And Their Length Were Inconsistent With Precision's Reasonable Expectations And Destroyed Benefits That Precision Reasonably Anticipated

The panel suggested that the FS's "misbehavior" did not deny Precision anything because C[T]6.01 provided for "the listing of a new species and delays associated with reassessing [FS] projects," and "Precision Pine had no reasonable expectation that its contracts would be unaffected by the listing of a new species." Pet.App.25a-26a. Although Precision may have had no reasonable expectation that its contracts would be unaffected if a new species were listed after award, nothing in C[T]6.01 suggests that Precision should have expected that the FS had, prior to award, acted unreasonably by violating its obligations under the ESA and thereby caused a post-award suspension related to a listing that occurred years before award. Contrary to the panel's apparent belief, the cause of the suspensions here was not "the listing of a new

species" after contract award. Pet.App.26a. Rather, it was the FS's *deliberate failure to do what the ESA required*, *i.e.*, the FS's prolonged refusal to enter into ESA consultation until it was ordered to do so by the district court. Pet.App.125a. This was not something that Precision had any reason to expect could legitimately interfere with its right to perform the contracts. In fact, had the FS promptly begun the required consultation upon the listing of the MSO (when most of the sales had yet to be awarded), the suspension would have been avoided.

The refusal of the FS to submit its LRMPs for consultation (particularly after a July 1994 decision of the Ninth Circuit expressly held that the FS was required to consult)[25] was unreasonable. Moreover, by continuing to award contracts while refusing to do things essential to contract performance, the FS engaged in precisely the kind of conduct that *Scott* held would support a finding of unreasonableness.[26] 333 F.3d at 1369. Additionally, even after the district court's order, the agency engaged in conduct which prolonged the ESA consultation, despite knowing specifically of the devastating impacts that the delay

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[25] *Pac. Rivers*, 30 F.3d 1050. Even after *Pacific Rivers* removed any doubt that the FS was required to consult on its LRMPs, on July 7, 1994, the FS refused to consult but continued to award contracts to Precision. Pet.App.41a n.1.

[26] *See* Pet.App.121a-129a. The trial court stated that because the FS's failure to submit its LRMPs was unreasonable, the government was culpable for the suspension of all 14 contracts but that breach of the duty not to hinder required a finding that the suspension's length was unreasonable, a finding that it made as to 11 of the contracts. Pet.App.125a-130a.

was having on Precision. Pet.App.63a-65a, 67a-76a, 126a-129a. This too was unreasonable and not something that Precision had reason to expect could legitimately interfere with its planned performance.

When an agency, by contract, shifts the risk of certain events to its contractor (as the FS attempted to do in contract clause C[T]6.01), the agency's implied duties require that it not take any action to increase that risk. *W.E. Callahan Constr. Co. v. United States*, 91 Ct. Cl. 538 (1940). In *Callahan*, a contract clause placed "all risk of damage . . . by reason of floods" on a contractor constructing a dam. *Id.* at 617. When the flood waters arrived (something which both parties anticipated), large logs left by agency employees working upstream were washed downstream and extensively damaged the contractor's plant and equipment. In refusing to absolve the agency of liability under the "all risk of damage" clause, the court held:

> [P]laintiffs only assumed the risk of damage by floodwaters and such debris from the jungle above that might be carried down by such floods, and, under the language of the contract, *the defendant impliedly agreed to assume the risk of any additional hazards which it might add to the flood dangers*. We think it is clear that the quoted provision of the contract cannot be construed to place upon plaintiffs the risk of damage directly resulting from additional and unexpected hazards imposed by the defendant, whether or not they were imposed carelessly, accidentally, or otherwise.

Id. at 619-20 (emphasis added); *see also id.* at 620 ("[W]here the Government by a written contract requires the contractor to assume a risk of loss or damage occasioned by the natural consequences of a specified cause, it reciprocally and impliedly assumes an obligation not to interfere in such a way as to increase the hazard of the risk so assumed").

The contractor's assumption of the risk of floods in *Callahan* did not foist on it the further risk that the contracting agency's actions would increase the impact of the floods. Similarly, Precision, by having the risk of a suspension in some circumstances placed on it, did not assume the additional risks that the FS would steadfastly refuse to comply with its ESA obligations to consult and unreasonably *cause* a federal court to enjoin the FS's performance and/or that other unreasonable FS conduct would prolong the resulting suspensions.[27]

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[27] *Callahan* is consistent with the common law precept that "[t]he law will not permit [a party] to take advantage of an obstacle to performance that it had created or that lies within its power to remove." 23 Richard Lord, WILLISTON ON CONTRACTS § 63.26 (4th ed. 2002). *See also Lowenschuss v. Kane*, 520 F.2d 255, 265 (2nd Cir. 1975) (an injunction will not absolve a party from contract breach where its fault contributed to the order); *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174, 183 (1945) (same). It is also consistent with this Court's precedent rejecting attempts by the government to relieve itself of liability for its own negligence. *United States v. Seckinger*, 397 U.S. 203, 212 (1970) ("if the United States expects to shift the ultimate responsibility for its negligence to its various contractors, the mutual intention of the parties to this effect should appear with clarity from the face of the contract"). Without a clear exculpatory clause, the government does not shield itself from suit. *See Ozark Dam Constructors v. United States*, 127 F. Supp. 187, 190-91 (Ct. Cl.

D. The Panel's Unexplained Departure From Prior Federal Circuit Precedent Will Engender Confusion Within The Tribunals Of The Circuit And Has Already Been Criticized By Commentators

Not surprisingly, the Federal Circuit's split in its own authority has already caused confusion in the lower courts. That is, in *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 675 (2010), the trial court, after discussing the conflict between the Federal Circuit's long-standing reasonableness test and the newly-announced standard in *Precision Pine*, determined that the reasonableness test remained good law in the Circuit and then applied it to find that the government's unreasonable actions had breached its implied duties to the contractor. By contrast, in *Greenhill v. United States*, 92 Fed. Cl. 385, 397 (2010), the trial court applied the *Precision Pine* "subjective intent to harm" standard. Unless rectified by this Court, the current split in authority over which standard applies to a breach of the implied contractual duties will result in further fracturing of the law in this area as the lower courts are left to choose between, and attempt to apply, two competing and irreconcilable standards.

In addition, the panel's ruling in *Precision Pine* has also already set off alarms in the government contracting community. For example, one prominent

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1955); *Kehm Corp. v. United States*, 93 F. Supp. 620, 625 (Ct. Cl. 1950); *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 412 (Ct. Cl. 1947).

government contracts journal has observed that the panel's ruling

> is a problematic decision that establishes a new, more demanding legal standard for breach of the implied duty to cooperate and not hinder--one that departs from prior precedent in the Federal Circuit and lower courts, as well as from the common law of contracts. How this new standard will be applied in future cases is not entirely clear, but *it will likely excuse a variety of objectively unreasonable conduct by one party to a Government contract that adversely impacts the other*.

Feature Comment "Fed. Cir. Resets Standard For Breach of the Duty to Cooperate and Not to Hinder," 52 GOVERNMENT CONTRACTOR ¶ 97, at 6 (Mar. 18, 2010) (emphasis added).

In this same regard, Professor Emeritus Ralph C. Nash, Jr., a pre-eminent authority on government contract law, has stated that the panel in *Precision Pine* "has articulated a standard . . . which flies in the face of almost all prior decisions. The troublesome language in the decision bodes ill for Government contractors." Nash, 24 Nash & Cibinic Rep., No. 5 at 65. As Professor Nash further observed, the rule of reasonableness that had long been applied in the law of government contracts directly benefited the government:

> Contractors selling supplies and services to the Government have traditionally priced such supplies and services on the basis that the law will protect them from unreasonable conduct by

> the Government during the performance of the conduct. This belief has been fostered by decades of decisions by the boards of contract appeals and the courts granting equitable adjustments, price adjustments or damages when the Government does not meet this reasonableness standard. *The Government has been the major beneficiary of this traditional view in the fact that, while it has occasionally been required to pay additional compensation to a contractor, it has obtained lower prices on many, if not most, of its procurements.*

Id. at 68 (emphasis added).

At a minimum, the Federal Circuit has completely confused the law in this area of government contracts (over which it has virtually exclusive jurisdiction) in a way that is likely to do substantial harm to the reasonable commercial expectations of both contractors and the government. Accordingly, this Court should grant *certiorari* to restore consistency to this important area of the law of government contracts which is of national significance.

III. At A Minimum, Because The Federal Circuit Imposed A New Legal Standard, It Erred By Not Remanding This Case To The Trial Court For Further Proceedings Under The New, "Correct" Standard

Regardless of whether the new standard adopted by the panel is correct, there can be no dispute that it is a different standard than the one applied by the trial court in 2001 when summary judgment was decided. Where, as here, a reviewing court determines that a

lower court has applied the wrong legal standard, the case law indicates that the court is obliged to remand to the lower court for consideration in light of the "correct law." *See, e.g., Ricci v. DeStefano*, --- U.S. ---, 129 S.Ct. 2658, 2702-03 (2009) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance") (citations omitted) (Ginsburg, J dissenting). *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *Pelts and Skins, LLC v. Landreneau*, 448 F.3d 743 (5th Cir. 2006); *Tabron v. Lt. Grace*, 6 F.3d 147, 158 (3rd Cir. 1993). "This usual approach allows the lower courts to determine whether further factual development is needed to apply the new rule. It permits the parties to the litigation to present arguments applying the new standard - arguments that they could not have made before as the standard did not exist." Melissa Hart, Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases, 13 Employee Rts. & Emp. Pol'y J. 253, 257 (2009).

Here, the factual record in the trial court so clearly demonstrated that the government had acted unreasonably in both causing and prolonging the suspension of Precision's contracts that summary judgment was entered in Precision's favor. Pet.App.134a-135a. Neither party argued for the standard ultimately employed by the Federal Circuit because, as Professor Nash has explained, the new standard flies in the face of the Federal Circuit's prior decisions that apply the very standard used by the trial court. Nash, 24 Nash & Cibinic Rep., No. 5 at 65. Accordingly, Precision could not have known, and therefore, had no opportunity to present evidence under the "specifically targeted" standard imposed by

the Federal Circuit *sua sponte* almost a decade after liability was decided by the trial court. Likewise, in granting summary judgment on liability in 2001 based on an objective, reasonableness standard, the trial court understandably never considered applying the subjective "specifically targeted" standard applied by the Federal Circuit for the first time in 2010. Pet.App.23a.

The Federal Circuit did not explain how, on a factual record developed to meet the reasonableness standard, it could determine that Precision would be unable to develop facts sufficient to meet the new "specifically targeted" standard being imposed. In essence, the Federal Circuit created a new legal standard and then, substituting itself for the trier of fact, granted summary judgment for the government on a factual record developed for a different legal standard. This is a radical departure from the accepted and usual course of judicial proceedings and due process requirements of the Fifth Amendment. Pet.App.138a. Indeed, "The core of due process is the right to notice and a meaningful opportunity to be heard," *Lachance v. Erickson*, 522 U.S. 262, 266 (1998), and to "present evidence . . . under the correct legal standards." *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1049 (6th Cir. 1990). In this regard, at an absolute minimum, the Federal Circuit erred in not remanding the matter to the trial court for further proceedings pursuant to the new, "correct" standard that it created. Thus, even assuming that this Court were to conclude that the standard announced by the panel is the correct one (which it is not), this Court should exercise its supervisory power to give Precision an opportunity to attempt to meet the new, subjective

standard in the first instance by developing a factual record on the issue in the trial court.

CONCLUSION

For the reasons set forth, this petition should be granted.

Respectfully submitted,

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Dated: September 8, 2010

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APPENDIX A

United States Court of Appeals,
Federal Circuit

Nos. 2008-5092, 2008-5093

[Filed February 19, 2010]

PRECISION PINE & TIMBER, INC.,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims in 98-CV0720, Judge George W. Miller

Richard W. Goeken, Saltman & Stevens, P.C., of Washington, DC, argued for plaintiff-cross appellant. With him on the brief was Alan I. Saltman.

David A. Harrington, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Michael F. Hertz, Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Bryant G. Snee, Assistant Director.

Before MAYER, LOURIE, and PROST, *Circuit Judges*.

PROST, *Circuit Judge*.

This is a government contract case. We must decide whether the federal government's suspension of fourteen contracts breached any express or implied warranties. These fourteen contracts are between the U.S. Forest Service and Precision Pine & Timber, Inc. ("Precision Pine"), and provide for timber harvesting in Forest Service Region 3, which covers Arizona's national forests. In August 1995, the Forest Service suspended the contracts pursuant to a court order. The order prohibited further timber harvesting in that region until the Forest Service consulted with the U.S Fish and Wildlife Service about the pertinent land resource management plans. *See Silver v. Babbitt*, 924 F. Supp. 976, 989 (D. Ariz. 1995). The order explained that such consultation was required under § 7 of the Endangered Species Act, 16 U.S.C. § 1536, due to the recent listing of the Mexican spotted owl as an endangered species. The fourteen contracts remained suspended until completion of the consultation process in December 1996.

Precision Pine subsequently brought this suit in the U.S. Court of Federal Claims, alleging that suspension of the contracts breached both express and implied warranties. The trial court agreed with Precision Pine. On liability, it granted summary judgment in favor of Precision Pine, concluding that the government breached both an express contractual warranty and the implied duty of good faith and fair dealing. *Precision Pine & Timber, Inc. v. United States* ("*Precision Pine I*" or "liability decision"), 50 Fed. Cl. 35, 65-72 (2001). Following this decision, the case was

transferred to a different judge for the sole purpose of adjudicating damages. After five years of discovery, a twenty-four day bench trial, and extensive supplemental briefing, the trial court awarded $3,343,712 in damages to Precision Pine. *Precision Pine & Timber, Inc. v. United States* ("*Precision Pine V*" or "preliminary damages decision"), 81 Fed. Cl. 235, 294 (2007); *see also Precision Pine & Timber, Inc. v. United States* ("*Precision Pine VI*" or "final damages decision"), 81 Fed. Cl. 733, 739-40 (2008). The United States now appeals the liability determination and damages award. We reverse.

Although the contract dates and terms differ slightly, for our purposes the issues posed are the same. Seven of the contracts present the question of whether a particular clause (CT 6.25) created an express warranty and, if so, whether it was breached. If CT 6.25 did create an express warranty, then we must also decide whether the government breached its implied duty to cooperate as to those contracts. For eleven of the contracts, we must also decide whether the United States breached its implied duty not to hinder.[1]

---

[1] Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing. *See, e.g., Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) ("Every contract, as an aspect of the duty of good faith and fair dealing, imposes an implied obligation 'that neither party will do anything that will hinder or delay the other party in performance of the contract.' "); *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *see also La.-Pac. Corp. v. United States*, 228 Ct. Cl. 363, 656 F.2d 650, 652-53 (1981); *Lewis-Nicholson, Inc. v. United States*, 213 Ct. Cl. 192, 550 F.2d 26, 32 (1977); *Peter Kiewit Sons' Co. v. United States*, 138 Ct. Cl. 668, 151 F. Supp. 726, 731 (1957).

We conclude that the answer to each of these questions is no. Clause CT 6.25 of the contracts did not create an express warranty, and the Forest Service's actions did not breach any implied duty to cooperate or not to hinder. Accordingly, we reverse the trial court's liability decision and vacate the damages award for all contracts, except the Hay contract. Because the government concedes it lacked authority to suspend the Hay contract,[2] we remand for further proceedings as to that contract. For the other thirteen contracts, the trial court should enter judgment for the United States.

BACKGROUND

The Forest Service is the agency charged with administering and maintaining national forests throughout the United States. *See* 16 U.S.C. §§ 551, 551a, 559e. National forests are not the same thing as national parks. National parks, like Yosemite and Yellowstone, were created to conserve the scenery, wildlife, and objects (natural and historical) within their boundaries, preserving them "unimpaired for future generations." The National Park Service Organic Act of 1916, 39 Stat. 535 (Aug. 25, 1916), (codified at 16 U.S.C. §§ 1-4). By contrast, national forests were created not only to conserve resources, but also to provide access to, and facilitate use of, their resources. *See* Forest Reserve Act of 1891, 26 Stat. 1103, (codified as amended at 16 U.S.C. § 471),

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[2] Unlike the other thirteen contracts, the Hay contract does not contain clause CT 6.01. CT 6.01 gives the Forest Service unilateral suspension authority. *See infra* Part I.B. On appeal, the Forest Service does not dispute that the absence of this provision means it lacked authority to suspend this contract.

repealed by Federal Land Policy and Management Act, Pub. L. No. 94-579 (Oct. 21, 1976); Forest Service Organic Administration Act, 30 Stat. 11 (June 4, 1897) (codified as amended at 16 U.S.C. §§ 473-478, 479-482, 551); Multiple Use-Sustained Yield Act of 1960, 74 Stat. 215 (June 12, 1960) (codified as amended at 16 U.S.C. §§ 528-531); *see also* National Forest Management Act of 1976, 90 Stat. 2949 (Oct. 22, 1976) (codified as amended at 16 U.S.C. §§ 1600-1614). Consistent with this mission, national forests are used for timber, minerals, water, grazing, and recreation. In its management capacity over national forests, the Forest Service has the authority to enter into timber harvesting contracts with private companies on behalf of the United States. 16 U.S.C. § 472a.

This case is about fourteen contracts the Forest Service awarded between June 1991 and July 1995. All of these contracts contain similar terms, which required Precision Pine to cut and remove the specified timber by the contract's termination date. Each contract established an operating season for harvesting the timber and prescribed the general harvesting methods Precision Pine could use. With one exception, all of the contracts also contained Special Contract Provision CT 6.01, titled "Interruption or Delay of Operations." CT 6.01 gave the Forest Service the right to suspend operations under the contract. The authority of the Forest Service to suspend Precision Pine's timber contracts pursuant to this provision became relevant because of a small animal popularly known as the Mexican spotted owl.

In April 1993, the Fish and Wildlife Service listed the Mexican spotted owl as an endangered species. *See* Endangered and Threatened Wildlife and Plants; Final

Rule To List the Mexican Spotted Owl as a Threatened Species, 58 Fed. Reg. 14,248 (Mar. 16, 1993). The listing of the owl triggered various statutory and regulatory obligations under the Endangered Species Act ("ESA"). Specifically, the ESA requires federal agencies, like the Forest Service, to consult with the Fish and Wildlife Service to ensure that any action "authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.01(b). While such consultations are taking place, § 7(d) of the ESA prohibited the Forest Service from making any "irreversible or irretrievable commitment of resources" during the consultation process. 16 U.S.C. § 1536(d).

After the listing decision, the Forest Service began formal consultations regarding several Region 3 projects that it determined "m[ight] affect" the Mexican spotted owl. It also began informal consultations about amending the Land Resource Management Plans ("LRMPs") for Region 3 to incorporate management direction for the owl. As the name suggests, a LRMP is intended to guide the use and management of natural resources within a part of the national forest system. *See id.* § 1604(a), (b). Every national forest has an LRMP, which the Forest Service is responsible for developing, maintaining, and updating as necessary to account for changed circumstances. *Id.* § 1604(f)(6). Activities occurring within a national forest, such as timber harvesting, must be "consistent with" the applicable LRMP. *Id.* § 1604(i). The Forest Service did not submit any of Region 3's existing LRMPs for formal consultation with the Fish and Wildlife Service. It instead

maintained that the ESA required no further formal consultation about the existing LRMPs, because those LRMPs had already been subject to formal consultation, albeit before the Mexican spotted owl listing decision.

The U.S. Court of Appeals for the Ninth Circuit reached a contrary, binding conclusion in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). In *Pacific Rivers*, the Ninth Circuit held that all LRMPs (new and existing) constitute ongoing "agency actions," requiring formal consultation whenever a new species is listed as threatened or endangered. *Id.* at 1055-56. The Ninth Circuit further explained that pursuant to its decision in *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992), timber sales were "per se irreversible and irretrievable commitments of resources under section 7(d) [of the ESA], and thus could not go forward during this consultation period." *Pac. Rivers*, 30 F.3d at 1057.

In August 1994, less than a month after the Ninth Circuit's decision in *Pacific Rivers*, several environmental groups filed suit in the U.S. District Court for the District of Arizona. The groups sought an injunction that would halt all timber harvesting in Region 3, including harvesting pursuant to Precision Pine's contracts. *Silver*, 924 F. Supp. at 980. While this litigation was ongoing, the Forest Service began informal consultation on "all relevant aspects of the Forest Service Plans [(LRMPS)]" and stated its intention to begin formal consultations about amendments to the LRMPs. *Id.* at 981. In July 1995, the Forest Service initiated formal consultation with the Fish and Wildlife Service "on the effect of the

Mexican [s]potted owl and its critical habitat from implementation" on the as-amended LRMPs. *Id.*

On August 24, 1995, the Arizona district court granted the environmental plaintiffs' motion for partial summary judgment in *Silver,* 924 F. Supp. at 989. In *Silver,* the court determined that the Forest Service's site-specific consultations on the existing LRMPs and planned consultation on the amended LRMPs, did not satisfy the requirements of ESA § 7(a). Based on the Ninth Circuit's decision in *Pacific Rivers,* the Arizona district court also held that § 7(d) of the ESA barred all new, ongoing, and announced activities during the consultation period that the Forest Service determined "m[ight] affect" the Mexican spotted owl. *Id.* at 989. Among these activities were the timber harvesting contracts in Region 3. Based on these conclusions, the court ordered the Forest Service to:

> (1) [I]mmediately commence re-consultation on existing LRMPS in Region 3 in compliance with Section 7(a)(2) of the ESA and its relevant regulations to consider the listing of the Mexican spotted owl as threatened.
>
> (2) Pursuant to Section 7(a)(2) of the ESA . . . defer or suspend all timber harvest activities taken pursuant to the Region 3 LRMPs until the required consultation commences.
>
> (3) Pursuant to Section 7(d) of the ESA . . . defer or suspend all timber harvest activities until the re-consultation on existing and amended LRMPS in Region 3 is complete.

Id.

Pursuant to the Arizona district court's order in *Silver*, the Forest Service requested formal consultations with the Fish and Wildlife Service on September 6, 1995. The consultations began in early November 1995. While those consultations were ongoing, Precision Pine's timber contracts remained suspended pursuant to the injunction in *Silver*. The Arizona district court dissolved the injunction on December 4, 1996, over a year after its initial order. *Precision Pine V*, 81 Fed. Cl. at 241.

While the contracts were suspended pursuant to the injunction, Precision Pine informed the Forest Service that it considered the Forest Service to have breached the timber contracts. *Precision Pine V*, 81 Fed. Cl. at 242; *see also Precision Pine & Timber, Inc. v. United States* ("*Precision Pine III*"), 62 Fed. Cl. 635, 648-51 (2004). Precision Pine, however, elected to treat the breaches as partial; it resumed harvesting pursuant to the contracts after the suspensions were lifted and requested contract term adjustments for each contract affected by the suspensions. *Precision Pine III*, 62 Fed. Cl. at 648-51. The Forest Service granted these requests, extending each contract by the number of days Precision Pine lost during the normal operating season due to the suspensions. *Id.*

In addition to requesting and receiving contract adjustments, Precision Pine submitted claims for damages resulting from the suspensions to the Forest Service contracting officer. The contracting officer awarded $18,242.78 of the $13 million Precision Pine claimed in damages. *Id.* at 52.

In 1998, Precision Pine filed this action in the Court of Federal Claims. The complaint alleged that

the suspensions breached the Forest Service's implied duty of good faith and fair dealing. *Precision Pine V*, 81 Fed. Cl. at 243. The Court of Federal Claims agreed. *Precision Pine I*, 50 Fed. Cl. at 73-74. In granting summary judgment in favor of Precision Pine on liability, the trial court found that the government breached the contracts under three different theories.

For the seven contracts entered into after the *Pacific Rivers* decision,[3] the trial court held that the Forest Service breached an express warranty created by clause CT 6.25. For these same seven contracts, the trial court also held that the Forest Service breached an implied duty to cooperate. *Precision Pine I*, 50 Fed. Cl. at 69-70; *Precision Pine V*, 81 Fed. Cl. at 266-67. The breach of the express warranty and implied duty to cooperate occurred after the Ninth Circuit issued its decision in *Pacific Rivers;* however, damages from these breaches did not arise until the contracts were suspended in August 1995, pursuant to the Arizona district court's order. *Precision Pine V*, 81 Fed. Cl. at 267.

For eleven of the contracts,[4] the trial court held that the Forest Service breached the implied duty not to hinder because the length of the suspensions was unreasonable and attributable to the Forest Service's actions. *Id.* at 70-72; *see also Precision Pine V*, 81 Fed.

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[3] The Mud, Monument, Saginaw-Kennedy, Brann, Manaco, Brookbank and Kettle contracts. *Precision Pine I*, 50 Fed. Cl. at 73.

[4] The Hay, O.D. Ridge, U-Bar, Jersey Horse, Salt, Mud, Monument, Saginaw-Kennedy, Manaco, Brookbank and Kettle contracts. *Precision Pine V*, 81 Fed. Cl. at 267.

Cl. at 266-67. After this determination on liability, the case was assigned to a different judge, who oversaw discovery and conducted a six-week trial on damages.

The trial court determined that Precision Pine was not entitled to damages as a lost volume seller because such damages were too remote and indirect to be recoverable as a matter of law. *Precision Pine V*, 81 Fed. Cl. at 250. Based on the alternative harvesting and mill schedule devised by the trial court, Precision Pine was awarded $3,343,712 in damages. *Precision Pine VI*, 81 Fed. Cl. at 740. In arriving at this figure, the trial court concluded that Precision Pine had proved its losses with reasonable certainty, though it disallowed certain consequential damages. *Precision Pine V*, 81 Fed. Cl. at 281-83, 294. The trial court refused to reduce the damages award by the amount of losses Precision Pine would have incurred by harvesting roundwood as required under the contracts, concluding that Precision Pine would have been excused by clause BT 6.4 due to "gross economic impracticability." *Id.* at 278-79.

The government now appeals the trial court's findings on liability and damages. Precision Pine cross-appeals the damages award, arguing that it was entitled to increased manufacturing costs (alternately termed "sawmill costs" or "mill inefficiency costs") for all of the breached contracts, not just the Brann contract.[5]

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[5] In light of our conclusions on liability, we need not reach the other issues Precision Pine raises in its cross-appeal. *See Aventis Pharma Deutschland GmbH v. Lupin, Ltd.*, 499 F.3d 1293, 1303 (Fed. Cir. 2007) (declining to reach a cross-appeal that was moot in light of the opinion's other conclusions).

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

On appeal, we must decide whether Precision Pine is entitled to damages resulting from the government's suspension of its fourteen contracts pursuant to the Arizona district court's order in *Silver*. The answer to this question depends on whether the Court of Federal Claims was correct to hold the government liable for breach of contract.

I. Liability

The facts relevant to the question of liability are not in dispute, though the conclusions that follow from them are. On appeal, we must decide two issues: First, whether clause CT 6.25 of the timber contracts creates an express warranty; second, whether the government breached the implied duty of good faith and fair dealing.

We review the trial court's grant of summary judgment on liability de novo. *Felix v. Am. Honda Motor Co.*, 562 F.3d 1167, 1168, 1180-81 (Fed. Cir. 2009). The trial court's liability decision primarily turned on the proper interpretation of the timber contracts, a matter of law. We review this interpretation without deference. *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1368 (Fed. Cir. 2004). In doing so, we apply general rules of contract interpretation, even though the United States is a party to the contracts. *Lockheed Martin IR Imaging Sys., Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997). Contract terms are given their plain and ordinary

meaning, unless the provisions are ambiguous. *Alaska Lumber & Pulp v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993).

A. Express Warranty

On appeal, the main issue is whether CT 6.25 contained any warranty about what the Forest Service had or had not done, prior to drafting and including the protection measures in CT 6.25. In other words, did CT 6.25 expressly or by implication incorporate the statutory requirements of the ESA into the contracts? For the following reasons, we conclude that the answer is no.

CT 6.25, titled "Protection of Habitat of Endangered Species," states that:

> Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or as follows:
>
> [Contract-specific measures listed, if any.]
>
> If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under CT8.2 or unilaterally modify this contract or provide additional protection regardless of when

> such factors become known. Discovery of such areas by either party shall be promptly reported to the other party.
>
> In the event of contract modification under this Subsection, Purchaser [Precision Pine] shall be reimbursed for any additional protection required by the modification, provided that any work or extra protection required shall be subject to prior approval by the Forest Service. Amount of reimbursement shall be determined by the Forest Service using standard Forest Service rate redetermination methods in effect at time of agreed change and shall be in the form of a reduction in Current Contract Rates unless agreed otherwise in writing. However, in no event may Current contract Rates be reduced below Base Rate.

Precision Pine has consistently argued CT 6.25 expressly warrants that the Forest Service complied with the statutory requirements of the ESA and disclosed every "special measure" which the Forest Service knew or should have known. *Precision Pine I*, 50 Fed. Cl. at 65-66. The government disagrees with this reading, arguing that the plain language of CT 6.25 does not guarantee the Forest Service took any particular actions to assure that the representations in CT 6.25 were accurate or that the list of "special measures" was complete.

The Court of Federal Claims construed CT 6.25 to create an express warranty. *Id.* According to the trial court, this warranty guaranteed that the Forest Service had identified any "special measures" necessary to comply with the ESA at the time the

contracts were entered into, based on an analysis of reasonably available information. *Id.* at 66-67. The trial court found that the Forest Service breached this express warranty by failing to formally consult about the LRMPs after the Ninth Circuit's decision in *Pacific Rivers,* which clarified that the ESA required such consultation.[6] *Id.* at 69-70. The trial court then found that the Forest Service misrepresented the accuracy and completeness of the special measures in CT 6.25-because in fact the Forest Service had "no reasonable basis" to know whether those measures were adequate, having failed to follow the procedures required by the ESA. *Id.*

We read CT 6.25 differently. Our analysis begins with the language of the contracts. The plain language of the contracts, including CT 6.25, does not warrant that the Forest Service followed any particular procedures, or complied with any particular statutory requirements, in devising the "special [protective] measures" listed in CT 6.25. Though CT 6.25 refers to the ESA, this reference is best understood as explaining the source of any special measures, rather than as imposing any particular obligations on the Forest Service.

Nor do we read CT 6.25 to incorporate the requirements of the ESA. *Cf. Smithson v. United States,* 847 F.2d 791, 794 (Fed. Cir. 1988). The language of CT 6.25 alleged to incorporate the requirements of the ESA is:

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[6] For the Mud, Monument, Saginaw-Kennedy, Brann, Manaco, Brookbank and Kettle contracts.

> Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or as follows: . . . [specific measures stated here].

This language is not sufficient to incorporate the ESA or its implementing regulations into the contracts. To incorporate material by reference, a contract must use clear and express language of incorporation, which unambiguously communicates that the purpose is to incorporate the referenced material, rather than merely acknowledge that the referenced material is relevant to the contract. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344-45 (Fed. Cir. 2008); *see also* 11 Richard A. Lord, Williston on Contracts § 30.25 (4th ed. 1999). Precision Pine's timber contracts use no such language; nothing in CT 6.25, or the contracts more generally, explicitly incorporates the ESA. *St. Christopher Assocs. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008); *see also S. Cal. Fed. Savings & Loan Ass'n v. United States*, 422 F.3d 1319, 1329-30 (Fed. Cir. 2005). As with the contract in *Smithson*, here the contract's passing reference to the entire corpus of the ESA-itself a complex set of statutory provisions-did not automatically result in "wholesale incorporation" of that statute. 847 F.2d at 794. Had the parties intended to incorporate the ESA, they could have done so expressly, through an integration clause. *See Northrop Grumman*, 535 F.3d at 1344. In the absence of explicit contract language incorporating the

ESA, we decline to create a whole new set of obligations-compliance with the multitude of substantive and procedural requirements comprising the ESA-by mere implication. *Cf. St. Christopher,* 511 F.3d at 1384.

Our conclusion is consistent with this court's decision in *Scott Timber Co. v. United States,* which similarly concerned the government's obligations arising out of timber contracts between the Forest Service and a private party, Scott Timber. 333 F.3d 1358, 1360 (Fed. Cir. 2003). *Scott Timber* held that an identically-worded provision (C6.25) did not create an implied warranty "as to any measures actually taken" by the Forest Service. *Id.* at 1370. This court also rejected Scott Timber's argument that the Forest Service was liable for misrepresentation because C6.25 expressly gave the Forest Service authority to cancel or unilaterally modify the contract "to provide additional protection regardless of when such facts become known." In light of this clear language in the contract, this court held that Scott Timber could not have reasonably assumed that no further protective measures would ever be needed in the covered areas. *Id.* at 1371.

The contracts belonging to Precision Pine give the Forest Service the same authority as the contracts in *Scott Timber* to cancel or modify, "regardless of when such factors become known." *See id.* at 1370-71. As this court did in *Scott Timber,* we conclude that this language in CT 6.25 disclaims any explicit or implicit suggestion that the listed "special measures" are complete, unchanging, or assured to be adequate. *Id.; T. Brown Constructors, Inc. v. Pena,* 132 F.3d 724, 728-29 (Fed. Cir. 1997) (holding that a claim of

misrepresentation requires the contractor to show it "honestly and reasonably relied" on an erroneous representation of a material fact, to its detriment); *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667-68 (Fed. Cir. 1992) (holding that a claim of misrepresentation requires the party seeking relief to show it (1) "relied upon such misrepresentation," and (2) "was damaged thereby"). Similarly, the contract's detailed reimbursement scheme, which is triggered by a contract modification, put Precision Pine on notice that the listed protection measures were subject to change, thereby precluding reasonable reliance.

The Supreme Court's decision in *Hercules, Inc. v. United States*, 516 U.S. 417, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996), is not to the contrary. *Hercules* held that the government was not responsible for costs that manufacturers of Agent Orange incurred defending against third-party tort claims, even though those claims were based on a product (Agent Orange) made according to government-provided specifications. *Id.* at 425, 116 S.Ct. 981. To the extent *Hercules* speaks to the type of warranty arising from government-required specifications in a contract, it holds that the specification identifies what the contractor must do to render satisfactory performance, not what the government must have done in devising the contract's specifications.

This case is about the latter, not the former. Precision Pine is not attempting to collect damages or avoid responsibility for consequences arising from a defective specification. *Cf. id.* at 424-26, 116 S.Ct. 981; *United States v. Spearin*, 248 U.S. 132, 136, 54 Ct. Cl. 187, 39 S.Ct. 59, 63 L.Ed. 166 (1918). As in *Hercules*, we decline to read the contract specification, here CT

6.25, expansively. 516 U.S. at 425, 116 S.Ct. 981. CT 6.25 did not obligate the government to take any particular steps in devising the special protection measures.

For these reasons, the trial court erred in construing CT 6.25 to create an express warranty and holding the Forest Service liable for misrepresentation.[7] CT 6.25 says nothing about what procedures were or were not used to come up with the listed protection measures. To the extent it said anything on the issue, CT 6.25 informed Precision Pine that the listed measures could not be assumed adequate, as evidenced by the detailed contingency procedures for canceling or modifying the contract.

B. Implied Duty

The issue on appeal is whether the Forest Service breached the implied duty of good faith and fair dealing, which the trial court also termed the implied duty not to hinder and the implied duty to cooperate. To answer that question, we begin by asking whether the suspensions were authorized. We conclude that clause CT 6.01 expressly gave the Forest Service such authority.

CT 6.01 (emphasis added) provides that:

> Purchaser agrees to interrupt or delay operations under this contract, in whole or in

---

[7] Based on our construction of CT 6.25, the Forest Service did not breach its implied duty to cooperate as to those seven contracts.

part, upon the written request of the contracting officer:

> (a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;
>
> (b) *To comply with a court order, issued by a court of competent jurisdiction;* . . . .
>
> Purchaser agrees that in the event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be: (1) Contract Term Adjustment pursuant to BT8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

The plain terms of CT 6.01 authorize the Forest Service to "interrupt or delay operations under th[e] contract . . . (b) [t]o comply with a court order." The Forest Service suspended the contracts on August 25, 1995, pursuant to the Arizona district court's order in *Silver*, which required the Forest Service to "defer or suspend all timber harvest activities [in Region 3] . . .

until the required consultation commences." 924 F. Supp. at 989. As this court concluded for an identically-worded provision (C6.01) in *Scott Timber*, we hold that CT 6.01 gave the Forest Service authority to "unilaterally suspend operations under any contracts with the [CT 6.01] clause." 333 F.3d at 1366.

Because the suspensions were authorized, the only remaining question is whether the Forest Service's actions during the suspensions violated the implied duty of good faith and fair dealing. The duty of good faith and fair dealing is inherent in every contract. Restatement (Second) of Contracts § 205. In essence, this duty requires a party to not interfere with another party's rights under the contract. *Id.* at cmt.d. The United States, no less than any other party, is subject to this covenant. *First Nationwide Bank v. United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005).

The trial court found that Forest Service's actions during the suspension resulted in the suspension being unreasonably long. *Precision Pine I*, 50 Fed. Cl. at 70-71. Specifically, the trial court concluded that the Forest Service hindered the contracts because twelve days elapsed after the Arizona district court's order in *Silver* before the Forest Service requested formal consultation. *Id.* at 70. The trial court also found the two-month delay that preceded the actual start of formal consultations unreasonable; the Forest Service spent this period formulating and revising its Biological Assessment to include requested information. *Id.* at 48. Finally, the trial court found the Forest Service unreasonably delayed the consultation process by failing to provide a legally sufficient Biological Opinion that conformed to a joint stipulation with the environmental groups in *Silver*. *Id.* at 48-50,

71. In support of this finding, the trial court cited the Arizona district court, which had reprimanded the Forest Service on several occasions for attempting to resume timber harvesting while the injunction remained in effect.

There is no question that the Forest Service's efforts to resume timber harvesting were premature and in violation of the injunction in *Silver*. Not all misbehavior, however, breaches the implied duty of good faith and fair dealing owed to other parties to a contract. *See First Nationwide*, 431 F.3d at 1350 (noting that not all governmental action that affects existing government contracts violates the implied duty of good faith and fair dealing).

Cases in which the government has been found to violate the implied duty of good faith and fair dealing typically involve some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract. *See, e.g., id.* at 1350-51; *Centex Corp. v. United States*, 395 F.3d 1283, 1304-07 (Fed. Cir. 2005); *see also Hercules*, 516 U.S. 417, 116 S.Ct. 981, 134 L.Ed.2d 47. The government may be liable for damages when the subsequent government action is specifically designed to reappropriate the benefits the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract. *Centex*, 395 F.3d at 1311.

Centex and *First Nationwide* are prototypical examples of this modus operandi. In *Centex* and *First*

Nationwide, various private companies bought failing savings and loan institutions from the government in exchange for significant tax deductions and tax-exempt reimbursements. *First Nationwide,* 431 F.3d at 1344-45; *Centex,* 395 F.3d at 1304-06. Several years later, Congress enacted remedial, retroactive legislation (the "Guarini Legislation") that disallowed these tax deductions, the effect of which was to deprive the private companies of what was a significant, central benefit of the contract. *First Nationwide,* 431 F.3d at 1345, 1349-50; *Centex,* 395 F.3d at 1304-06. In both cases, this court concluded that the Guarini Legislation was specifically targeted at the plaintiffs' contract rights, thereby breaching the implied covenant of good faith and fair dealing by eliminating a material part of the consideration. *First Nationwide,* 431 F.3d at 1345, 1349-50; *Centex,* 395 F.3d at 1304-06. In concluding that the legislation was targeted, this court emphasized that the statute: specifically addressed a small number of transactions, was sought by the Internal Revenue Service for the purpose of eliminating the precise benefit contracted for, not part of a broader changing in the Tax Code affecting taxpayers generally, and "sole[ly] impact[ed]" these contracts. *Centex,* 395 F.3d at 1305-06.

There are no similar indicia of a governmental bait-and-switch or double crossing at work here. We conclude that there was no breach of the government's implied duty of good faith and fair dealing because the Forest Service's actions during these formal consultations were (1) not "specifically targeted," and (2) did not reappropriate any "benefit" guaranteed by the contracts, since the contracts contained no guarantee that the Precision Pine's performance would proceed uninterrupted. *Cf. id.* at 1306.

The Forest Service's actions are not akin to the "specifically targeted" government action in *First Nationwide, Centex*, or *Hercules*. In those cases, the subsequent government action was for the specific purpose of eliminating an express, bargained-for benefit in the contracts and "sole[ly] impact[ed]" these contracts. *Hercules*, 516 U.S. at 433, 116 S.Ct. 981; *First Nationwide*, 431 F.3d at 1350-51; *Centex*, 395 F.3d at 1305-07. Here, there is no evidence that the Forest Service's slight delay in initiating formal consultations, or its initially unsuccessful attempts to formulate a satisfactory Biological Opinion, were undertaken for the purpose of delaying or hampering Precision Pine's contracts. Nor is there any evidence of bad faith or a failure to cooperate with Precision Pine. *Cf. Centex*, 395 F.3d at 1304-06; *Malone*, 849 F.2d at 1445-46.

There is evidence that the Forest Service failed to cooperate, but that failure was in the context of the *Silver* litigation and the Forest Service's consultations with the Fish and Wildlife Service. Because liability only attaches if the government action "specifically targeted" a benefit of Precision Pine's contract, how the delay arose is not only relevant, but dispositive here. Though Precision Pine was unquestionably affected by the *Silver* litigation, it was not a party to that suit or the formal consultations. Accordingly, the fact the Forest Service violated its obligations under the ESA to the Fish and Wildlife Service, an unrelated third party, does not mean the Forest Service violated its duties to Precision Pine under the timber contracts, to whom these statutory duties were not owed. *See Agredano v. United States*, 595 F.3d 1278, 1280-82, 2010 WL 537160, at *2-3 (Fed. Cir. 2010); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1365 (Fed.

Cir. 2009); *supra* Part I.A. Similarly, the incidental effect on Precision Pine's contracts that resulted from the Forest Service's statutory obligations under the ESA did not, without more, violate the duty of good faith and fair dealing owed to Precision Pine.

In addition to the lack of "specifically targeted" government action, the Forest Service's actions did not breach its implied duty of good faith and fair dealing because uninterrupted contract performance following an ESA listing decision was not a "benefit" guaranteed by the contracts. Although the implied duty of good faith and fair dealing attaches to every contract, *what* that duty entails depends in part on what that contract promises (or disclaims). Accordingly, we examine what the contracts say and the circumstances of this case. *See Hercules*, 516 U.S. at 424-25, 116 S.Ct. 981 (explaining that a party asserting an implied warranty "must establish that, based on the circumstances at the time of contracting, there was an implied agreement between the parties to provide the undertakings the petitioners allege"); *Centex*, 395 F.3d at 1305-07.

The valuable benefit Precision Pine bargained for was the right to harvest timber in a certain place, at a certain time. Significantly, however, the contracts expressly qualified that benefit. *See Agredano*, 595 F.3d at 1280-82, 2010 WL 537160, at *2-3 (holding there was no implied warranty when such a warranty was expressly disclaimed). For our purposes, the relevant qualification is in the provisions that provide for the situation which arose here-the listing of a new species and delays associated with reassessing Forest Service projects. Under CT 6.01, Precision Pine "agree[d] to interrupt or delay operations under this

contract, in whole or in part," to prevent serious environmental degradation or to comply with a court order, such as the injunction in *Silver*. Similarly, CT 6.25 allowed the Forest Service to modify or cancel the contracts in order to comply with the ESA. Unlike the contracts at issue in *Centex* and *First Nationwide*, Precision Pine's contracts did not promise or guarantee uninterrupted performance following a listing decision; the plain language of the contracts state their provisions may be modified, suspended, or even canceled to comply with the ESA. If anything, CT 6.01 and CT 6.25 expressly contemplate and allow the Forest Service to interfere with Precision Pine's performance. *Cf. Centex*, 395 F.3d at 1304-06.

The implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions. *Id.* at 1304-06; *see also Agredano*, 595 F.3d at 1280-82, 2010 WL 537160, at *2-3. In these contracts, CT 6.01 and CT 6.25 make clear that one "benefit" the parties did not contemplate, and which Precision Pine is thus not entitled to under the contracts, is the guarantee of uninterrupted performance. *Cf. id.* (noting that the benefit eliminated by subsequent government action was an "important part of the contract consideration" and one "they reasonably expected the government not to withhold"). Because Precision Pine had no reasonable expectation that its contracts would be unaffected by the listing of a new species like the Mexican spotted owl, the Forest Service's actions did not destroy Precision Pine's reasonable expectations under the contract. *Id.* at 1304; *see also* Restatement (Second) of Contracts § 205.

II. Damages: the Hay contract

For the reasons stated above, the Forest Service did not breach any express warranty or implied duties associated with Precision Pine's contracts. Accordingly, Precision Pine is not entitled to damages flowing from the suspension of any of the contracts except the Hay contract. The Hay contract lacks CT 6.01, as well as any equivalent provision giving the Forest Service suspension authority. *See supra* Part I.B. As the government concedes, the Forest Service breached the Hay contract on August 25, 1995, by suspending it to comply with the injunction in *Silver*. *Precision Pine I*, 50 Fed. Cl. at 46. That, however, is not the end of the matter. The real question is how much money Precision Pine should receive in compensation for that breach.

On appeal, the government challenges the trial court's damage calculations on several grounds. First, the government argues that the methodology chosen by the trial court to calculate damages is not supported by substantial evidence. Second, the government argues that the trial court should have reduced the damages award by the losses Precision Pine would have sustained from harvesting roundwood, as required by the contract terms. In its cross-appeal, Precision Pine argues that it was entitled to manufacturing costs (also termed "mill inefficiency" or "sawmill costs").

At trial, Precision Pine sought to recover lost profits it claimed would have been earned from the sale of lumber and lumber by-products, had Precision Pine been able to harvest timber during the suspension period. *Precision Pine & Timber v. United*

States ("*Precision Pine IV*"), 72 Fed. Cl. 460, 464-65 (Ct. Cl. 2006). During a six-week bench trial on damages, the trial court received extensive documentary evidence and heard testimony from numerous witnesses. To estimate lost profits, Precision Pine's damage expert, Mr. Robert Ness, attempted to determine what Precision Pine's total revenues would have been from timber harvested under the contracts during the suspension period, less direct costs for harvesting the timber and manufacturing it into lumber and lumber by-products. *Id.* at 465. The first step in Ness's methodology was to determine how much timber Precision Pine would have harvested in the absence of a breach. To estimate the amount of timber, Ness relied on a "reconstructed" timber harvesting schedule that Precision Pine's president, Mr. Lorin Porter, testified his company would have followed. *Id.* at 261. Using several different conversion factors, Ness then estimated the volume of lumber products Precision Pine could have produced from the timber. *Id.* at 261-62.

In calculating the damages award, the trial court did not fully credit the methodology used by Precision Pine's damages expert. *Precision Pine V*, 81 Fed. Cl. at 268-71; *see also Precision Pine VI*, 81 Fed. Cl. at 735. Specifically, the trial court found that Precision Pine would not have followed the specific harvesting schedule on which Ness's calculations were based. *Precision Pine V*, 81 Fed. Cl. at 268. Although Precision Pine failed to carry its burden of proof with respect to the precise harvesting schedule, the trial court nevertheless found Precision Pine showed it sustained damages as a direct and foreseeable result of the Forest Service's breach. *Id.* Based on its review of the evidence, the trial court constructed its own

alternative harvesting schedule, which it then used to calculate damages. *Id.* at 268-71.

The trial court did not reduce the damages award by the losses Precision Pine would have sustained for harvesting and disposing of roundwood, trees that are less than nine inches in diameter. *Id.* at 278-79. Instead, the trial court concluded that removal of roundwood would have been excused under clause BT 6.4 of the contracts, due to "gross economic impracticability." The court based this conclusion on evidence that Precision Pine would have had effectively no market for the roundwood, which would have caused it to suffer losses from roundwood harvesting that exceeded its average net profits per year.

Also relevant to this appeal is the trial court's conclusion that Precision Pine was not entitled to recover manufacturing costs on the Hay contract. Precision Pine presented evidence that the Forest Service's breach caused it to suffer losses due to the lower volume and quality of logs its mills processed. *Id.* at 291-92. The trial court concluded that such manufacturing costs were too remote and consequential, because the costs were associated with milling timber from other, collateral contracts not at issue in this suit. *Id.*

To the extent these contentions are relevant to the proper measure of damages for the Hay contract, we address them below.

A. Sufficiency of the Evidence

The government challenges the damages award on two grounds. First, the government argues that Precision Pine failed to prove damages with reasonable certainty. Second, the government argues that the trial court abused its discretion by ordering supplemental briefing and then awarding damages based on those filings, rather than reopening the case for additional testimony and argument.

For the following reasons, we conclude that the trial court's damage calculations were supported by substantial evidence. We further hold that the trial court did not abuse its discretion in refusing to reopen the record.

Whether Precision Pine proved damages for the Hay contract with "reasonable certainty" really reduces to a question of what Precision Pine was required to prove. The government argues that the trial court was limited to two stark choices: accept Precision Pine's damage calculations in their entirety, or enter judgment for the United States. We cannot agree that the trial court's options were so limited.

In a bench trial, such as the one conducted below, the trial court sits as both judge and jury. As the jury, the trial court weighs the evidence and reaches a verdict. A major difference between verdicts rendered by a judge and by a jury is what we know on appeal. In a contract case, a typical jury verdict is a "yes" or "no" to liability, accompanied by a handwritten figure for damages. A judge frequently says more, explaining why he found a party liable (or not) and how any damages award was calculated. *See* Fed. R. Civ. P.

52(a). The fact that a judge says more, however, does not alter that judge's discretion to weigh the evidence or our standard of review. *See, e.g., Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1171-72 (Fed. Cir. 2006); *Gjerlov v. Schuyler Labs., Inc.*, 131 F.3d 1016, 1019 (Fed. Cir. 1997); *see also Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1359 (Fed. Cir. 2006). As the fact finder in the bench trial, the judge is responsible for deciding what evidence to credit or reject and what result to reach. Just as a jury may find for a party without believing everything that party's witnesses say, a judge may award damages, even if he does not fully credit that party's methodology. On appeal, the question with respect to damages is whether the evidence adduced at trial was sufficient to enable the fact finder (judge or jury) to make a "fair and reasonable approximation." *Nat'l Australia Bank v. United States*, 452 F.3d 1321, 1327 (Fed. Cir. 2006). In other words, the party seeking damages has the burden of proving them with "reasonable certainty." As the phrase itself suggests, reasonable certainty requires more than a guess, but less than absolute exactness or mathematical precision. *Bluebonnet Sav. Bank v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001).

We conclude that substantial evidence supported the award of damages on the Hay contract, even though the trial court based the award on a timber harvesting schedule of its own design, rather than the schedules offered by either party. It was proper for the trial court to resolve conflicting testimony by weighing the evidence and making its own findings. *See* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give

due regard to the trial court's opportunity to judge the witnesses' credibility."); *Ecolochem, Inc. v. S. Cal. Edison Co.*, 227 F.3d 1361, 1378-79 (Fed. Cir. 2000) (giving "great deference" to the trial court's decisions regarding the credibility of witnesses and weight accorded to different evidence). The trial court did not abuse its discretion by modifying Precision Pine's methodology for calculating damages, particularly since those modifications minimized the effects of uncertainty and arbitrary assumptions on the damages award. *Cf. LaSalle Talman Bank, F.S.B. v. United States*, 462 F 3d 1331, 1336-37 (Fed. Cir. 2006) (holding that the trial court's modified methodology for calculating damages was not an abuse of discretion). The record reflects that the trial court carefully weighed the evidence, providing well-reasoned explanations for its assumptions and why it credited particular evidence. *Precision Pine V*, 81 Fed. Cl. at 268-77.

We similarly conclude that the trial court did not abuse its discretion in refusing to reopen the record. *See* Fed. R. Civ. P. 52(b), 59(a)(2); *Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362 (Fed. Cir. 1999) (reviewing denial of motion to reopen the record for abuse of discretion). Though a trial court "may" reopen a judgment after a bench trial to take additional evidence or amend its findings, the decision to do so rests within the sound discretion of the trial court. Fed. R. Civ. P. 59(a)(2). Here, the trial court did not abuse its discretion in denying the government's motion to reopen, considering the probative value of the evidence proffered, the explanation for why it was not offered earlier, and the likelihood of undue prejudice. We agree that these factors weigh against the government. The "new" damages evidence the

government sought to dispute was not actually new, but simply Precision Pine's mathematical calculations using evidence already presented and tested at trial. *Precision Pine VI*, 81 Fed. Cl at 735. The government's proffered evidence largely restated its early objections to the damage calculations, without providing an explanation for why those opinions were not offered earlier. To the extent the computations themselves were "new," the government had a full and fair opportunity to dispute them in its response to Precision Pine's post-trial brief.

B. Roundwood Losses

The parties stipulated that there was "no roundwood to be harvested on the Hay timber sale contract." Thus, Precision Pine would not have sustained any losses on the Hay contract from harvesting roundwood, even if the trial court had not found such harvesting excused by clause BT 6.4. Because the proper construction of BT 6.4 is thus irrelevant to calculating any damages owed on the Hay contract, we do not decide whether BT 6.4 excuses roundwood removal for gross economic impracticability.

C. (Cross-Appeal) Manufacturing Costs

In its cross-appeal, Precision Pine challenges the trial court's denial of "mill inefficiency costs" allegedly flowing from suspension of the Hay contract.[8] Though Precision Pine calls these expenses "mill inefficiency

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[8] In its opinion, the trial court referred to these expenses as "mill inefficiency costs." *Precision Pine V*, 81 Fed. Cl. at 291.

costs" or "increased manufacturing costs," these names are misnomers. The "losses" claimed are actually the fixed costs of operating Precision Pine's sawmills-namely, the cost of labor, taxes, and insurance. Precision Pine's expert opined that the Forest Service's breach increased these costs (which, of course, could not really increase because they are, by nature, fixed) because the cost of manufacturing a certain *volume* of timber (1000 board feet) increased. *Precision Pine V*, 81 Fed. Cl. at 291-92. As this court held in *Scott Timber*, we conclude that these fixed costs were not directly related to the Hay contract and not a direct result of the suspension. 333 F.3d at 1371-72; *see also Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996) (holding that remote and consequential damages are not recoverable). While the cost *per board* "increased," there was no actual change in the underlying cost of operating the sawmills; Precision Pine would have had to bear the costs of its sawmill operations regardless of whether the Forest Service breached the contracts.

Accordingly, the trial court properly denied Precision Pine's claims for manufacturing costs on the Hay contract.

CONCLUSION

For the foregoing reasons, we conclude that CT 6.25 did not create an express warranty and the Forest Service did not breach its implied duty of good faith and fair dealing. We accordingly reverse the trial court's judgment of liability and vacate the damages award on all contracts except the Hay contract. Because the Forest Service lacked authority to suspend it, we affirm the liability finding on the Hay

contract. Precision Pine is entitled to damages on the Hay contract from the date of the Forest Service's breach in August 1995, until the suspension was lifted in December 1996. On remand, the trial court should award damages on the Hay contract consistent with this opinion. For the remaining thirteen contracts, the trial court should enter judgment for the United States.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

APPENDIX B

United States Court of Federal Claims

No. 98-720 C

[Filed July 30, 2001]

PRECISION PINE & TIMBER, INC., Plaintiff,

v.

THE UNITED STATES, Defendant.

Alan I. Saltman, Washington, DC, counsel of record for plaintiff. *Richard W. Goeken*, Washington, DC, of counsel.

James C. Caine, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for defendant, with whom on the briefs were *Kathryn A. Bleecker*, Assistant Director; *David M. Cohen*, Director; and *Stuart E. Schiffer*, Acting Assistant Attorney General. Lori Polin Jones and Patricia Leigh Disert, U.S. Department of Agriculture, of counsel.

OPINION

DAMICH, Judge.

This contract case is before the Court on the Defendant's motion to dismiss or, in the alternative, for summary judgment on the issue of liability, dated July 12, 2000, and the Plaintiff's cross-motion for summary judgment, dated September 11, 2000. At issue are 14 timber sale contracts that were suspended by the Forest Service. After consideration of the arguments presented by both parties in their initial and supplemental briefs and at oral argument, the Court determines, for the reasons enumerated below, that the Forest Service breached its implied duty to cooperate with respect to 7 of the contracts and its implied duty not to hinder 11 of the contracts when it suspended them. Therefore, the Court DENIES the Defendant's motion to dismiss or, in the alternative, for summary judgment, and GRANTS, in part, the Plaintiff's motion for summary judgment as to liability.

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I. Background

A. Introduction

Between January 1990 and July 1995, the Forest Service awarded 14 timber sale contracts in Arizona to the Plaintiff or other timber purchasers from whom the Plaintiff subsequently acquired the contracts.[1] These contracts were suspended by the Forest Service on August 25, 1995, after being ordered to do so by a federal district court. *Silver v. Babbitt,* 924 F. Supp. 976, 989 (D. Ariz. 1995). The suspensions were ordered

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[1] The contracts and their award dates are as follows:

Contact	Number	Award dated
Hay	001152	06/24/91
St. Joe	001582	10/16/92
O.D. Ridge	001574	08/14/92
U-Bar	005051	10/05/92
Jersey Horse	001756	12/13/93
Salt	005937	02/28/94
Hutch-Boondock	005465	06/29/94
Mud	005556	09/14/94
Monument	005564	09/28/94
Saginaw-Kennedy	006585	09/29/94
Brann	006577	09/29/94
Manaco	004625	01/17/95
Brookbank	001822	04/13/95
Kettle	001830	07/20/95

Precision Pine obtained the Hay timber sale from another timber purchaser with Forest Service approval on June 24, 1991. Precision Pine obtained the St. Joe timber sale from another timber purchaser by third-party agreement approved by the Forest Service on October 16, 1992. (Pl.'s Cross-Mot. at App. 607-08.)

by the district court because the Forest Service failed to submit its Land and Resource Management Plans ("LRMPs" or "Forest Plans") in Region 3 of the Forest Service for consultation with the Fish and Wildlife Service ("FWS") as it was required to do by section 7 of the Endangered Species Act ("ESA") when the Mexican spotted owl was listed as a threatened species.[2] *Id.* These contracts remained suspended until December 4, 1996. The Forest Service maintains that certain provisions in the contracts authorized the suspensions. The Plaintiff, however, argues that the suspensions breached the Forest Service's implied duties to cooperate and not to hinder the contracts. More specifically, the Plaintiff argues that the breach of the implied duty to cooperate was caused by the Forest Service's misrepresentation that it had identified the measures that were necessary for the protection of all species listed under the ESA (i.e., restrictions on timber sale activities) and had included those measures in the contract. However, because the Forest Service had not submitted its Region 3 Forest Plans for consultation with the FWS as it was required by law to do, the Plaintiff maintains that the Forest Service had no reasonable basis to know whether the restrictions on logging contained in the contracts were adequate.[3] The Plaintiff also maintains that the failure

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[2] All federal agencies, including the Forest Service, are required to engage in formal consultations with the FWS, as appropriate, in order to "utilize their authorities in furtherance of the purposes of this chapter [of the ESA] by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [the ESA]." 16 U.S.C. § 1536(a)(1).

[3] The Plaintiff characterizes this claim in different terms, such as a misrepresentation or a violation of an express warranty or a

of the Forest Service to timely submit its LRMPs for consultation was unreasonable. Because the cause of the suspensions was unreasonable, the Plaintiff maintains that the suspensions breached the Forest Service's implied duty not to hinder the contracts.

The factual narrative below describes, in more or less chronological order, the circumstances surrounding the listing of the Mexican spotted owl as a threatened species, the Forest Service's protracted resistance to the submission of its Region 3 LRMPs for consultation to the FWS, the *Silver v. Thomas* litigation which led to the suspension of the contracts at issue, and the protracted length of the suspensions. All of these circumstances, in large part the result of missteps by the Forest Service, tie in to the claim that the Forest Service breached its implied duties to cooperate and not to hinder the contracts when it suspended them. Because the factual narrative is lengthy, it has been divided into sections. First, the contractual provisions which purport to give the Forest Service authority to impose suspensions is discussed. Second, the statutory duties of the Forest Service relevant to this case is outlined. Third, the strategy of the Forest Service to avoid submission of its Region 3 Forest Plans for consultation in the aftermath of a proposal to list the Mexican spotted owl and adverse decisions in the Ninth Circuit is summarized. Fourth,

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violation of the implied duties to cooperate and not to hinder the contracts. For the sake of simplicity, cogency, and avoidance of redundancy, the Court analyzes this claim in terms of whether the contract contained a specific warranty that was breached, thereby breaching the implied duty to cooperate. The nature, analysis, and outcome of the claim is the same regardless of how it is characterized.

the final rule that lists the Mexican spotted owl as a threatened species and the adequacy of the Forest Service's protective measures in the eyes of the Fish and Wildlife Service is briefly discussed. Fifth, the continuing strategy of the Forest Service to avoid submitting Region 3 Forest Plans in the face of the listing of the Mexican spotted owl and another adverse decision in the Ninth Circuit is summarized. Sixth, the ongoing strategy of the Forest Service to avoid submission of its Forest Plans for consultation in the face of the *Silver v. Thomas* litigation that resulted in the suspension of the contracts at issue is discussed. Seventh, the suspension of the contracts and the harm to the timber industry that the Forest Service knew would be caused by the suspensions is discussed. Finally, the protracted consultation process during the period of suspension is discussed in detail.[4]

B. Events Leading Towards the Suspension of the Subject Contracts

1. Relevant Contractual Terms

The contracts at issue in this case, with the exception of one called the Hay contract, contain Special Contract Provision CT6.01, "Interruption or Delay of Operations," which gives the Forest Service

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[4] In its cross-motion for summary judgment, the Plaintiff has amply documented the findings of fact contained in the factual narrative below. To the extent that the Defendant has disputed some of the facts contained in the foregoing narrative, it has only disputed the manner in which the Plaintiff has characterized certain documents. Thus, the Court finds that there is no genuine issue of material fact in dispute.

the right to suspend operations under timber sale contracts as follows:

> Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of the contracting officer:
>
> (a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;
>
> (b) To comply with a court order, issued by a court of competent jurisdiction; or
>
> (c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions on this sale are the same as or nearly the same as conditions existing on sale(s) named in such an order as described in (b).
>
> Purchaser agrees that in the event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be: (1) Contract Term Adjustment pursuant to BT8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered

> by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

(Def.'s Mot. at App. 1.)

Each of the contracts at issue, including the Hay contract, contained Special Contract Clause CT 6.25, "Protection of Endangered Species," which, in the event a new species is listed under the ESA, allows the Forest Service to modify or unilaterally cancel timber contracts to provide additional protection for endangered or threatened species.[5] (Def.'s Mot. at App. 2.) This clause provides as follows:

> Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or are as follows:
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> * * *

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[5] "Endangered species" means any species (other than certain insect species) "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532. "Threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a portion of its range. *Id.*

> If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under CT 8.2 or unilaterally modify this contract or provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.
>
> In the event of contract modification under this Subsection, Purchaser shall be reimbursed for any additional protection required by the modification, provided that any work or extra protection required shall be subject to prior approval by the Forest Service. Amount of reimbursement shall be determined by Forest Service using standard Forest Service rate redetermination methods in effect at time of agreed change and shall be in the form of a reduction in Current Contract Rates unless agreed otherwise in writing. However, in no event may Current Contract Rates be reduced below Base Rates.

(Def.'s Mot. at App. 2.)

2. Consultation Requirements Under the ESA

Activities, including timber sales, in National Forests are governed by the LRMP for each forest. 16 U.S.C. § 1604(f)(5). Each timber sale offered by the Forest Service must be "consistent" with the LRMP for the National Forest on which it is offered. 16 U.S.C. § 1604(i).

The ESA requires federal agencies, in this case, the Forest Service, to consult with the FWS before making any "irreversible or irretrievable commitment of resources" in order to insure the protection of endangered and threatened species.[6] Pursuant to the regulations implementing the ESA, formal consultations are to be completed within 90 days. 50 C.F.R. § 402.14. After consultations, the FWS issues a Biological Opinion ("BO"), which is a determination issued by the FWS as to whether a particular "agency action" is likely to jeopardize the listed species and which describes, if necessary, reasonable and prudent alternatives that will avoid a likelihood of jeopardy. 16 U.S.C. § 1535(b)(3)(A). The agency is expected to comply with the BO. *Id.* A BO is to be issued within 45 days after formal consultations. 50 C.F.R. § 402.14(e).

The Ninth Circuit in *Lane County Audubon Society v. Jamison*, 958 F.2d 290, 293 (9th Cir. 1992), and *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994), has held that LRMPs are "agency action" pursuant to the ESA and that consultations must be reinitiated on an existing LRMP if a new endangered species is listed. Furthermore, the

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[6] Section 7(a)(2) of the ESA provides that each Federal agency, "shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). The Secretary of the Interior has delegated responsibility for consultations to the FWS in this instance. 50 C.F.R. § 402.01(b). Section 7(d) of the ESA mandates that the Forest Service may not make any "irreversible or irretrievable commitment of resources" during consultations. 16 U.S.C. § 1536(d).

implementing regulations of section 7 of the ESA provided that "reinitiation of formal consultation is required and shall be requested by the Federal agency or by the [Fish and Wildlife] Service where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . (d) If a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(d). Thus, the Forest Service was required to reinitiate consultations with the FWS on existing LRMPs, despite the fact that the Mexican spotted owl was not listed as endangered until 1993, after the LRMPs for National Forests in Region 3 were completed between 1985 and 1988. (Pl.'s Cross-Mot. at App. 299.)[7]

3. The Forest Service's Strategy to Avoid Submission of Forest Plans for Consultation in Response to the Proposed Listing of the Mexican Spotted Owl as a Threatened Species

On or about December 21, 1989, Robin Silver, M.D., (later the lead plaintiff in *Silver v. Thomas*) petitioned the FWS to list the Mexican spotted owl as threatened or endangered under the ESA, 16 U.S.C. § 1531, *et seq.*, claiming that existing regulations were inadequate and accusing the Forest Service of compromising scientific concerns in order to continue

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[7] In *Pacific Rivers*, the Forest Service had disputed that the LRMP was agency action and that consultations on existing LRMPs had to be reinitiated. *See* discussion, *infra*, § I(B)(v).

logging activities.[8] (Pl.'s Cross-Mot. at App. 122-26.) The Forest Service opposed the petition and attempted to stave off listing by various means, including: revising its forest management guidelines by means of non-binding directives, disputing FWS findings in the press, and beginning the process of preparing a new conservation strategy to be included in the Region 3 Forest Plans. (Pl.'s Cross-Mot. at App. 127-43, 153-97.)

Furthermore, even if the Mexican spotted owl were to be listed, the Forest Service hoped for reversal of the decision in *Lane County*, 958 F.2d at 293, that programmatic management plans used to implement timber sales were "agency action." This decision required government agencies to consult with the FWS under section 7 of the ESA whenever a newly listed species could be affected by activities conducted pursuant to a timber management plan. The timber management plans in *Lane County* were analogous to the LRMPs in Region 3.

Unfortunately for the Forest Service, the Mexican spotted owl was listed as an endangered species on April 15, 1993, (*Endangered and Threatened Wildlife and Plants; Final Rule To List the Mexican Spotted Owl as a Threatened Species*, 58 Fed. Reg. 14,248 (March 16, 1993)), and the *Lane County* decision was

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[8] In his petition, Dr. Silver claimed that the listing of the Mexican spotted owl was necessary because "existing regulatory mechanisms for protecting the owl are inadequate" (Pl.'s Cross-Mot. at App. 122) and that " '[p]rotection' of the Mexican spotted owl currently consists of USDA Forest Service (USFS) non-legally binding policy guidelines, that have compromised scientific concern to insure continued, excessive timber quotas." *Id.*

affirmed. *Lane County*, 958 F.2d at 293. Importantly, *Lane County* also held that timber sales were "irreversible and irretrievable commitments of resources" under section 7(d) of the ESA. *Lane County*, 958 F.2d at 295. This meant that, during the period of consultation on the timber management plans, no timber sales could proceed. Thus, if *Lane County* was interpreted to mean that Region 3 of the Forest Service was required to submit its existing LRMPs for consultation upon the listing of a species under the ESA, then all timber sales would have to be suspended during the course of consultation.

4. The Listing of the Mexican Spotted Owl

In listing the Mexican spotted owl as endangered, the FWS mentioned several factors, one of which was the present or threatened destruction, modification, or curtailment of habitat or range.[9] Under this factor, timber harvest practices in New Mexico and Arizona were listed as a primary contributor to the Mexican spotted owl's listing as a threatened species along with other human activities and natural causes. *Id.* In its response to comments received regarding the proposed listing, the FWS took the position that the Forest

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[9] The other factors were: (1) the overutilization for commercial, recreational, or scientific, or educational purposes; (2) disease or predation; (3) inadequacy of existing regulatory mechanisms; and (4) other natural or man-made factors affecting the owls' continued existence.

Service's LRMPs in Region 3 were not adequate to assure the protection of the Mexican spotted owl.[10]

In response to the listing of the Mexican spotted owl as a threatened species, the Forest Service submitted for formal consultations with the FWS four separate "iterations" of projects that Forest Service biologists had determined "may affect" the Mexican spotted owl. However, the Forest Service did not submit any of its existing LRMPs for its forests in

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[10] The Final Rule listing the Mexican spotted owl stated in relevant part:

> Forest Plans for the next decade for the 11 national forests in New Mexico and Arizona call for continued conversion of habitat to a non-suitable habitat at a rate of 0.4 percent per year. The habitat lost under a shelterwood harvest system is permanently maintained in a condition not suitable as owl habitat. This loss of habitat will, in time, result in the endangerment of the owl. Forest plans [LRMPs] govern forest practices and, as long as they are in effect, the Service cannot ignore their content.

58 Fed. Reg. at 14,253.

* * * * * *

> The Service [FWS] recognizes and appreciates the efforts the Forest Service had taken to reduce the impacts of its management on the Mexican spotted owl. However, the Service does not believe that the Forest Service's interim directives provide adequate long-term protection to guarantee the long-term existence of the owl across its range. The Forest Service has not yet been able to develop and adopt a conservation strategy that the Service believes will adequately protect the owl.

58 Fed. Reg. at 14,263.

Region 3 for consultation with the FWS. (Pl.'s Cross-Mot. at App. 226-30.) In response to the "iterations" of projects, the FWS issued three BOs for the projects submitted for consultation by Region 3 of the Forest Service. (Pl.'s Cross-Mot. at App. 231-55.) However, in each BO, the FWS recommended that the Forest Service enter into a "true" programmatic consultation on a region-or forest-wide basis. (Pl.'s Cross-Mot. at App. 234, 243, 252.)

5. The *Pacific Rivers* Decision and the Continuing Strategy of The Forest Service to Avoid Submission of Forest Plans for Consultation

On October 25, 1993, the United States District Court for the District of Oregon ruled that LRMPs that existed prior to the listing of a species under the ESA were "agency action" for which the Forest Service was required to reinitiate consultation under the ESA whenever a new species is listed. *Pacific Rivers Council v. Robertson,* 854 F. Supp. 713, 723 (D. Or. 1993). The effect of this ruling was that the LRMPs in Region 3 which were enacted prior to the listing of the Mexican spotted owl would need to be submitted for consultation and that timber sales contracts would need to be suspended.

Shortly afterwards, on December 10, 1993, Earthlaw, an environmental public-interest organization, sent a Notice of Intent to Sue ("NOIS") on behalf of several southwest-based environmental organizations to the Secretary of Agriculture, the Chief of the Forest Service, the Secretary of the Interior and the Director of the FWS. (Pl.'s Cross-Mot. at App. 256-60.) The NOIS stated, among other things, that

the Forest Service's ongoing failure to consult on the Forest Plans affecting the Mexican spotted owl was a violation of section 7 of the ESA, and, unless the violation was corrected, suit would be brought to compel the Forest Service's compliance with the ESA. (Pl.'s Cross-Mot. at App. 259-60.) In support of its position that the Forest Service was in violation of the ESA, Earthlaw specifically cited both *Lane County* and *Pacific Rivers*. (Pl.'s Cross-Mot. at App. 259.)

Nevertheless, the Forest Service did not submit any of the LRMPs in Region 3 for consultation in response to the NOIS. Instead, as stated in a strategy memorandum dated January 31, 1994, Region 3 decided that it wanted to appeal the district court's ruling in *Pacific Rivers* to the Ninth Circuit on the grounds that pre-existing LRMPs are not "agency action" within the meaning of the ESA. (Pl.'s Cross-Mot. at App. 266-70.) The Forest Service, however, did not seek a stay of the decision. Although the Forest Service met with the FWS to work out a programmatic consultation, it continued to submit sample consultation packages that the FWS found insufficient to complete consultation and to issue a BO.[11]

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[11] At approximately the same time that the Forest Service was pursuing this legal strategy, on January 20, 1994, James R. Lloyd, Director of Wildlife and Fisheries Management for Region 3 of the Forest Service, confirmed the scheduling of a meeting on January 27, 1994, with the FWS to discuss the consultation process and "ways to implement a programmatic consultation." (Pl.'s Cross-Mot. at App. 265.) On February 28, 1994, the Forest Service and FWS held a meeting, the purpose of which was "to discuss the possibility of the Forest Service preparing a programmatic document for the FY94 Timber Sale program." (Pl.'s Cross-Mot. at

The FWS position that Region 3's measures to protect the Mexican spotted owl were inadequate was made public in a Federal Register notice responding to a petition to remove the Mexican spotted owl from the ESA list of threatened species. *Endangered and Threatened Wildlife and Plants: 90-Day Finding on a Petition to Remove the Mexican Spotted Owl from the List of Endangered and Threatened Wildlife,* 59 Fed.Reg. 15,361 (Apr. 1, 1994).[12] In deciding not to

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App. 271-72.) However, the FWS expressed its view that sample consultation packages offered by the Forest Service were not sufficient for the FWS to complete consultation and issue a BO. (Pl.'s Cross-Mot. at App. 272.) The representative of the Forest Service in that meeting did not agree with the FWS position on consultations. He reported that ". . . based on what I heard at the meeting today, I recommend that we continue submitting projects to USFWS for consultation in the same manner we have in the past." (Pl.'s Cross-Mot. at App. 272.)

[12] The FWS decision stated in relevant part,

> The listing petition pointed out that forest plans called for additional conversion of owl habitat from suitable to capable, which, added to ongoing conversion, would result in the likely extinction of the subspecies. The protection offered by Forest Service Region 3 Interim Directive Number 2 (ID No. 2) was not considered to be adequate. The [FWS] continues to believe, as do Forest Service researchers in the Northwest (Thomas *et al.* 1990) and California (Verner *et al.* 1992), that protection only of single territories as proposed in ID No. 2 would inevitably lead to the extinction of the habitat dependent species. Based on continued and projected destruction of habitat and inadequate regulation, the Service [FWS] determined that the Mexican spotted owl was likely to become an

"de-list" the Mexican spotted owl, the FWS further emphasized the inadequacy of the Forest Plans by stating that "[t]he practice of even-aged management called for in Region 3 Forest Management Plans has resulted in owls disappearing from previously occupied territories without subsequent return. The Forest Service is currently revising its Forest Management Plans; however, the revised guidelines have not been formally adopted yet." *Id.* at 15,361-62.

On Thursday, July 7, 1994, the U.S. Court of Appeals for the Ninth Circuit affirmed the holding of the District Court in *Pacific Rivers*. The Ninth Circuit decided that LRMPs are comprehensive management plans governing a multitude of individual projects and as such represent ongoing "agency actions" for which the Forest Service is required to consult[13] under section 7 of the ESA whenever a new species is listed. Critically, the Ninth Circuit explicitly directed that the holding of *Lane County* that timber sales were "per se irreversible and irretrievable commitments of resources under section 7(d), and thus could not go forward during the consultation period," was applicable to LRMPs. *Pacific Rivers*, 30 F.3d at 1057

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endangered species in the foreseeable future through all or a significant portion of its range.

Id. at 15,365 (emphasis added).

[13] In this case, the Forest Service was required to consult with the National Marine Fisheries Service [NMFS] regarding the effects of LRMPs on the Snake River Chinook salmon. 30 F.3d at 1051. The Forest Service's obligation to reinitiate formal consultation on Forest Plans with respect to newly listed species is the same with either NMFS or FWS.

(*citing Lane County*, 958 F.2d at 295). The effect of this decision essentially meant that the Forest Service was required to submit for consultation those LRMPs which existed prior to the listing of the Mexican spotted owl and that, as irreversible and irretrievable commitments of resources, timber sales could not be performed during consultation.

The Forest Service was aware, at least as early as October 11, 1994, that *Pacific Rivers* was directly applicable to the LRMPs in Region 3. In response to an August 19, 1994, inquiry from Senator Dirk Kempthorne, the Chief of the Forest Service acknowledged that the Forest Service had submitted some of its LRMPs for consultation due to the *Pacific Rivers* decisions and specifically recognized the likely application of *Pacific Rivers* to the LRMPs in Region 3 as alleged by the suit pending in Region 3:

> Yes, the principles of the Ninth Circuit's *Pacific Rivers Council* decision would likely extend beyond the Snake River salmon. Other cases based on the Ninth Circuit's ruling have been filed, *Silver v. Thomas*, 94-1610 (D. Ariz.) (Mexican spotted owl).

(Pl.'s Cross-Mot. at App. 319-22.)

The Forest Service had earlier submitted 6 LRMPs from Regions 1 and 4 for consultation in addition to that of Region 6, which it submitted for consultation on September 9, 1994. *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365, 368 (D. Idaho 1995). However, the Forest Service did not submit any LRMPs from Region 3 for formal consultation with the FWS after the Ninth Circuit's decision in *Pacific*

Rivers. (Pl.'s Cross-Mot. at 324-26.) According to an e-mail dated October 18, 1994, written by Patrick L. Jackson, Region 3 Special Assistant for Appeals, to Vince DeWitte, Staff Attorney, Land Management Planning & Environmental Law Section, Office of General Counsel, USDA, an ostensible reason for Region 3's opposition to submission of LRMPs was that it believed that the existing LRMPs themselves did not provide adequate protections for the Mexican spotted owl.[14]

Instead of submitting its Region 3 LRMPs for consultation and suspending the timber sale contracts at issue at this time, the Forest Service issued, in July 1994, a Draft Environmental Impact Statement ("DEIS") which proposed to *amend* the Forest Plans in Region 3 to, among other things, provide management

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[14] The e-mail stated, in relevant part,

> "[W]e are better served if we consult over the amendments that are currently being prepared. It makes no sense to consult over old Forest Plans which were the basic reason that the USFWS listed the MSO anyway."

(Pl.'s Cross-Mot. at App. 348.)

direction for the Mexican spotted owl.[15] (Pl.'s Cross-Mot. at App. 297-301.)

6. *Silver v. Thomas* Litigation

On August 8, 1994, several environmental groups filed suit in the United States District Court in Arizona ("Arizona district court") against multiple defendants, including Jack Thomas in his capacity as head of the Forest Service (*Silver v. Thomas*) and Bruce Babbitt in his capacity as the Secretary of the Department of the Interior (*Silver v. Babbitt*). The plaintiffs sought injunctive relief halting all timber harvesting activity in Region 3 of the Forest Service. (Def.'s Mot. at App. 3.) The plaintiffs alleged that the Forest Service's decision to harvest timber under existing LRMP's prior to completing formal consultation with the FWS on the effect of the listing of the Mexican spotted owl as a threatened species violated the ESA. (Def.'s Mot. at App. 13-15.)

Even after the *Silver v. Thomas* litigation was initiated, Region 3 and high ranking officials in the

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[15] The reasons for amending the Forest Plans included the following:

> Existing forest plans emphasize use of even-aged timber management systems. Uneven-aged management is a permissible system in all existing plans but it is not emphasized and there is little guidance for its use. New information indicates even-aged management may conflict with habitat needs for northern goshawk and Mexican spotted owl. The existing forest plan management emphasis needs to be changed.

(Pl.'s Cross-Mot. at App. 299.)

Washington Office of the Forest Service still opposed submitting its Forest Plans for consultation with the FWS even in the face of legal advice from the Department of Justice ("DOJ") to the contrary. In a memo dated November 3, 1994, the DOJ advised Region 3 of the Forest Service that *Pacific Rivers* applied directly to the *Silver v. Thomas* litigation and therefore "strongly recommended" that Region 3 "reinitiate consultation of current L[R]MPs and to complete ESA section 7(d) determinations on ongoing activities as soon as possible," (Pl.'s Cross-Mot. at App. 390) and further recommended that the Region settle *Silver v. Thomas* with the environmental plaintiffs. (Pl.'s Cross-Mot. at App. 394.) The DOJ went so far as to argue that the failure to follow *Pacific Rivers* in the *Silver v. Thomas* litigation could expose Department attorneys to sanctions for violating Rule 11 of the Federal Rules of Civil Procedure. *Id.*

However, instead of following the advice of the DOJ, Region 3 of the Forest Service sought Department of Agriculture intervention to "forestall the potentially serious negative effects on planning as the Forest Service has known it and on our ability to operate programs due to the Justice Department extension [sic] of the Ninth Circuit *Pacific Rivers Council* ruling to other lawsuits involving newly listed species." (Pl.'s Cross-Mot. at App. 393.) Specifically, the Forest Service wanted to seek a reversal of *Pacific Rivers* by the United States Supreme Court.[16] The

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[16] The Forest Service recommended to the Department of Agriculture that:

> The obvious solution is to seek a reversal of the 9th Circuit *PRC* ruling by the U.S. Supreme Court. This could

memorandum went on to state that "without the Department's intervention, there could be gridlock in Region 3 and elsewhere." *Id.* The memorandum also shows that the Forest Service contemplated there was a significant chance that forestry activities would be suspended due to the litigation.

> Since the Region has some information on the [Mexican spotted owl] from its work on the Draft EIS, preliminary estimates indicate that the section 7(d) determinations on the [Mexican spotted owl] will not result in *major* shutdowns of Region 3 programs. However, we are advised that there is a high likelihood that the plaintiffs will dispute such a finding and that the court may enjoin some projects, as the Oregon court did.

(Pl.'s Cross-Mot. at App. 395.)

Accordingly, the Government filed its petition for Writ of Certiorari to the Supreme Court in *Thomas v. Pacific Rivers Council* in February 1995. (Pl.'s Cross-Mot. at 404-07.) The petition specifically advised the Court of the "broad ramifications" of the Ninth Circuit's decisions, including the pendency of *Silver v. Thomas* which sought to enjoin all ground-disturbing projects on 11 National Forests. (Pl.'s Cross-Mot. at App. 406-07.) This petition was denied by the Supreme

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> put a hold on all Forest Plan reconsultations including those in Region 3, pending review by the Supreme Court, if a stay of the Ninth Circuit's ruling were obtained.

(Pl.'s Cross-Mot. at App. 396.) Nonetheless, the Forest Service never sought a stay of the Ninth Circuit Ruling in *Pacific Rivers*.

Court on April 24, 1995. *Thomas v. Pacific Rivers Council,* 514 U.S. 1082, 115 S.Ct. 1793, 131 L.Ed.2d 721 (1995). The Ninth Circuit's decision was not stayed during the Supreme Court's consideration of the petition.

Despite the Supreme Court's decision, instead of submitting its existing Forest Plans for consultation, on May 15, 1995, the Forest Service issued a revised notice of intent to *amend* the Forest Plans by issuing a final EIS. *Southwestern Region: Arizona, New Mexico, West Texas, and Oklahoma Amendment of National Forest Plans in the Southwestern Region to Include Guidelines for Management of Habitat for the Mexican Spotted Owl and Northern Goshawk,* 60 Fed. Reg. 25,884 (May 15, 1995).

Then, on July 14, 1995, Region 3 sought to initiate formal consultation with the FWS on *amended* LRMPs in Region 3, but it did not submit any existing LRMPs in Region 3 for consultation. (Pl.'s Cross-Mot. at App. 426-27.) The Forest Service argued in its July 27, 1995, motion for summary judgment in *Silver v. Thomas* that consultations on the amended LRMPs would avoid the holding of *Pacific Rivers.*[17] However,

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[17] The motion for summary judgment states in relevant part:

> The issues of whether an LRMP . . . is an "action" for purposes of the ESA that "may affect" the MSO need not be decided in this case because federal defendants already have reinitiated formal consultation on the potential effects on the MSO of all relevant LRMPs. Thus, federal

the Arizona district court did not accept the Forest Service's argument. On August 24, 1995, the court entered judgment in favor of the plaintiffs and ordered that:

> (1) The USFS shall immediately commence re-consultation on existing LRMPs in Region 3 in compliance with Section 7(a)(2) of the ESA and its relevant regulations to consider the listing of the Mexican Spotted Owl as threatened.
> (2) Pursuant to Section 7(a)(2) of the ESA, the USFS shall defer or suspend all timber harvesting activities taken pursuant to the Region 3 LRMPs until the required consultation commences.

Silver v. Babbitt, 924 F. Supp. 976, 989 (D. Ariz. 1995).

C. Suspension of the Contracts at Issue

On August 25, 1995, pursuant to the Arizona district court's order, the Forest Service suspended all timber sale contracts in Region 3, including the Plaintiff's timber sale contracts. (Def.'s Mot. at App. 33.)

In the aftermath of the suspensions, the Forest Service was aware of the far-reaching impact of the suspensions on the timber industry. On August 28, 1995, the Forest Service prepared a document called "Summary Of Effects Of Injunction On Timber

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> defendants do not contest these issues for purposes of this litigation.

(Pl.'s Cross-Mot. at App. 431.)

Harvest Activities On Region Three's Existing And Planned Timber Sales Program."

> September, October and November are critical months for logging in the Southwestern Region. December through most of April is usually too wet and not cold enough to provide good winter logging conditions. Starting in February and going through August 31, much of the forest is closed down to logging due to restrictions for the nesting and fledgling season for Mexican spotted owls and northern goshawks. Thus, the importance of September to November in allowing timber operators to bring in enough logs to keep mills operating through the winter and through the restricted logging season.
>
> A poll of Forest timber staff personnel indicates that about 40 to 50 percent of the total timber under contract at the present time is restricted for Mexican spotted owl and northern goshawks. Thus, if this injunction continues for 2-3 months, it is essentially a 12 month delay for a very high percentage of our sales. It also means that many mills will have to shut down for extended periods. Since they have been operating "on the edge" for some time due to low availability of logs to process, this injunction could cause mills to close permanently.

(Pl.'s Cross-Mot. at App. 458.)

Shortly afterwards, on September 14, 1995, the Forest Service assessed the impact of the suspension on the timber industry in Region 3:

> The effect on the timber industry is very serious. Most timber projects have been delayed and/or modified as consultation on each project took place. Sawlog inventories in most mills is very low. The logging season is restricted in most places to fall months due to protective requirements for the owl and goshawks. Thus we expect to lose the 1995 year of production which will put several mills out of business permanently. There is a total of 52 major contracts with a volume of 103 million board feet that has been sold. Another 35 planned sales currently on hold include 61 million board feet. The [sic] represents about 1300 job [sic] or families that will lose some or all of their annual income with another 700 secondary jobs affected. Twelve communities in Arizona and 28 in New Mexico will feel the effects. We expect about three sawmills to go out of business permanently if the injunction lasts through this logging season.

(Pl.'s Cross-Mot. at App. 459.)

However, the Forest Service anticipated that consultations would be completed within 90 days. (Pl.'s Cross-Mot. at App. 496.)

On October 18, 1995, the Forest Service entered into a stipulation with the plaintiffs in *Silver v. Babbitt*. (Pl.'s Cross-Mot. at App. 465-73.) In this stipulation, the Forest Service agreed to complete the ongoing consultation process with the FWS, not to appeal the Arizona district court's order, and to continue the suspension of timber harvesting activities already in place pursuant to the court's previous order

with the exception of certain enumerated projects which could be released for harvest.[18] The Stipulation reads in relevant part:

> The Forest Service will suspend implementation or approval of all projects involving the cutting of trees in Region 3 until consultation on the existing LRMPs and the LRMPs as amended are complete (*i.e.*, when the Biological Opinions are issued) . . .

(Pl.'s Cross-Mot. at App. 466.) Further, the parties agreed that "upon entry of the judgment in this action the Court shall retain jurisdiction to . . . enforce the provisions of this Order approving this Stipulation and the Judgment." (Pl.'s Cross-Mot. at App. 472-73.)

On October 18, 1995, the court approved the stipulation and issued an "Order Approving Stipulation Concerning Plaintiff's Claims Against United States Forest Service." (Pl.'s Cross-Mot. at App. 485-92.) Simultaneously, the court entered "Judgment Regarding Plaintiff's Claims Against The United States Forest Service." (Def.'s Mot. at App. 53-55.) In this judgment, the court ordered:

> that the Court retains jurisdiction to enforce the terms of its Order Approving Stipulation Concerning Plaintiff's Claims Against United States Forest Service, to enforce this judgment, to resolve the amount of fees and costs the

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[18] The Plaintiff was authorized to begin timber harvesting on the Brann, Hutch-Boondock, and St. Joe timber sales. (Pl.'s Compl. ¶ 39.)

> Forest Service must pay to plaintiffs, and to resolve the plaintiff's claims against the United States Department of Indian Affairs.

(Def.'s Mot. at App. 53-54).

D. Consultations on Existing LRMPs During the Period of Suspension

As stated above, the Arizona district court in *Silver v. Thomas* ordered reinitiation of formal consultations on August 24, 1995, but because the formal consultations became unreasonably protracted in length, they were not completed until December 4, 1996. Logging operations, of course, were suspended during this time.

Initially, the Forest Service did not immediately commence formal consultations as it was ordered to do by the district court, but instead requested informal consultations while it gathered information. (Pl.'s Cross-Mot. at App. 502.) However, the Forest Service finally did initiate a request that the FWS engage in formal consultation on the existing LRMPs on September 6, 1995. (Pl.'s Cross-Mot. at App. 503.) To facilitate consultations, the ESA required that the Forest Service prepare a Biological Assessment "for the purpose of identifying any endangered species or threatened species which is likely to be affected by [agency action.]" 16 U.S.C. § 1536(c)(1). On September 22, 1995, the Forest Service prepared a Biological Assessment for the reinitiation of consultation with the FWS in which the Forest Service determined that the continued implementation of each of the existing Forest Plans in Region 3 "may affect the spotted owl and/or its critical habitat." (Pl.'s Cross-Mot. at App.

508.) On September 28, 1995, the Forest Service forwarded the Biological Assessment to the FWS. (Pl.'s Cross-Mot. at App. 509-10.) However, formal consultations did not actually commence until November 9, 1995, because the Forest Service had not included all necessary information in the initial Biological Assessment that it submitted. (Pl.'s Cross-Mot. at App. 512-13.)

On April 2, 1996, 205 days after the Forest Service requested consultations with the FWS, the Forest Service provided the environmental plaintiffs with two draft BOs prepared by the FWS, ostensibly one for existing LRMPs and one for amended LRMPs. (Def.'s Mot. at App. 56.) The next day, the Forest Service and the FWS issued a joint press release which explained that the draft BOs had determined that ". . . a hypothetical implementation of the *existing* forest plans would jeopardize the continued existence of the owl and adversely modify its critical habitat. However, since the Forest Service will be implementing the *existing* plans to follow the [FWS'] Mexican Spotted Owl Recovery Plan and consulting on site specific projects, the owl will not be jeopardized." (Pl.'s Cross-Mot. at App. 527.) The press release further explained that the final BOs would be ready in 30 days. *Id.*

However, on April 11, 1996, the environmental plaintiffs filed a motion with the Arizona district court requesting a ruling that the Forest Service had not completed consultation because no final BO had been issued and that the BOs themselves were legally

insufficient.[19] (Def.'s Mot. at App. 57-74.) According to the environmental plaintiffs, the BO on existing LRMPs did not contain (a) jeopardy/no jeopardy findings; (b) findings on reasonable and prudent alternatives; or (c) an incidental takings statement.[20] (Pl.'s Cross-Mot. at 537.) Shortly after the filing of this

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[19] The implementing regulations of section 7 of the ESA provide that biological opinions shall include:

> (1) A summary of the information on which the opinion is based;
>
> (2) A detailed discussion of the effects of the action on listed species or critical habitat; and
>
> (3) The [FWS'] opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat ("a jeopardy biological opinion") or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy opinion"). A "jeopardy" biological opinion shall include *reasonable and prudent alternatives*, if any. If the [FWS] is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

50 C.F.R. § 402.14(h) (1995) (emphasis added).

[20] "Incidental take refers to takings [of species] that result from, but are not the purpose of, carrying out an otherwise lawful activity by the Federal agency or applicant." 50 C.F.R. § 402.02. An incidental takings statement is required whenever the FWS finds that implementation of proposed action or reasonable and prudent alternatives will lead to a "take" of a protected species. 50 C.F.R. § 402.14(i).

motion, the Forest Service sent a letter to the FWS which "clarified" the scope of the consultation on the existing LRMPs. (Pl.'s Cross-Mot. at 530). This clarification stated that ongoing section 7 consultations would be cancelled and that the Forest Service would engage in limited consultations with the FWS on what it described as "the implementation of existing forest plans as described in the enclosed standards for management of [Mexican spotted owl] habitat pending amendment of forest plans." *Id.*

On May 3, 1996, the Arizona district court issued an order stating that the draft BOs issued on April 2, 1996, were not legally sufficient for all of the reasons proffered by the environmental plaintiffs. (Def.'s Mot. at App. 75-81.) The court stated, in response to the Forest Service's attempt to engage in limited consultations:

> Both of these actions are in direct violation of this court's order and the stipulations of the parties. This court has already clarified that consultation will not be complete until the FWS issues a proper biological opinion. In addition, this court has addressed at length the issue of whether the USFS must consult on the existing forest plans or only the amendments to those plans as argued by the defendants. In the order of August 24, 1995, this court considered the issue and concluded that the USFS must consult on existing forest plans and amendments. In addition, the parties stipulated to consultation on the existing forest plans in the subsequent October stipulation and order. The Court is at a loss to understand why the USFS would not carry out its duties set forth in

> the law, orders of this Court, and stipulation of the parties when failure to carry out those duties could result in contempt. The USFS may not evade its obligation to consult on existing forest plans and amendments to those plans by consulting on less than that stipulated by the parties and ordered by the Court. The USFS must complete consultation as ordered by this Court on the existing forest plans-not just the amendments to those plans-before it may commence timber harvest that is not already proceeding by stipulation of the parties and order of the Court.

(Def.'s Mot. at App. 80.)

The court further stated:

> Unless the parties stipulate in writing promptly to the Court that another individual is responsible for the USFS, the Court will hold Mr. Thomas responsible for the USFS if it fails to carry out its duties under the ESA, regulations, stipulation of the parties and orders of this Court.

Id.

As a consequence of this ruling, the Forest Service continued its consultations with the FWS.

On July 12, 1996, the FWS issued to the Forest Service a final BO, in which it stated "that continued implementation of the existing forest plans will jeopardize the continued existence of the Mexican spotted owl and will adversely modify the species'

critical habitat." (Pl.'s Cross-Mot. at App. 551.) In response, on the same day, the Forest Service sent a letter to the FWS, unilaterally asserting that the existing LRMPs were compliant with the BO and that the Forest Service had completed the consultations required by section 7 of the ESA and the Arizona district court's order.[21] (Pl.'s Cross-Mot. at App. 552.) Furthermore, the Forest Service filed the BO with the Arizona district court and informed the court that it was lifting the suspensions notwithstanding the court's explicit reservation of jurisdiction to enforce the terms of the joint stipulation.[22] (Pl.'s Cross-Mot. at

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[21] The letter states in relevant part:

> [W]e have concluded that all biological effects on the Mexican spotted owl that could result from implementation of the Forest Plans have been addressed and that these Biological Opinions satisfy Section 7 requirements for programmatic consultation of Forest Plans. . . . We also believe that these consultations satisfy the court order and stipulation requiring a completed consultation on existing forest plans . . . .

(Pl.'s Cross-Mot. at App. 552.)

[22] The filing states in relevant part:

> Pursuant to paragraph 6 of the Stipulation, issuance of the biological opinions on these consultations also lifts the suspension of tree-cutting activities in the Arizona and New Mexico National Forests. Since both biological opinions have now been finalized and the consultations completed, the tree-cutting suspension has lifted and the Forest Service plans to resume normal forest operations on Monday, July 15, 1996.

(Pl.'s Cross-Mot. at App. 557.)

App. 557.) The Forest Service also issued a press release announcing that it would unilaterally "resume normal forest operations including tree-cutting on Monday, July 15, in the Southwestern Region . . . . This marks the end of a Court-ordered injunction that has been in effect since August 1995, over protection measures for the Mexican spotted owl." (Pl.'s Cross-Mot. at App. 554-55.)

However, in response to an emergency motion filed by the plaintiffs, the Arizona district court issued an order dated July 16, 1995, which stated that the Forest Service could not lift the suspensions until the court had ordered it to do so. (Pl.'s Cross-Mot. at App. 567.) The Arizona district court commented on the Forest Service's abortive attempt to resume timber sales in Region 3, as follows:

> [D]efendants were placed on notice that, if necessary, the Court intended to determine if consultation was complete and defendants were in compliance with the stipulation, the law and the orders of the Court. The Court is at a loss to understand why defendants would choose to proceed in this fashion in light of the Court's prior order advising defendants that the consultation would not be deemed to be complete until a "proper" biological opinion was issued under the requirements of the ESA and the applicable regulations. Instead, defendants have unilaterally determined that they have met all the requirements of the law, stipulation and orders of the court, and elected to proceed, even though the plaintiffs disagree, have raised the issue with the Court and the Court has had little to no opportunity to review the factual and

> legal issues. This is a highly unusual manner in which to proceed in this lawsuit or any lawsuit. *Rather than speeding up the resolution of this lawsuit, this situation again is being delayed by inappropriate procedures.*

(Pl.'s Cross-Mot. at App. 566-67) (emphasis added).

Moreover, the court stated:

> DEFENDANTS ARE HEREBY PUT ON NOTICE THAT THIS COURT CONSIDERS THE INJUNCTION STILL TO BE IN EFFECT UNTIL THE ISSUANCE OF FURTHER ORDERS OF THIS COURT.

(Pl.'s Cross-Mot. at App. 567) (capitalization in the original).

After holding a hearing with the parties on the issue of whether consultations were completed, the Court issued an order on July 25, 1996, in which it opined that the Forest Service was responsible for the delays in the completion of consultations:

> One year after the Court ordered the USFS to commence reconsultation and ten months after the stipulation to halt timber harvest activities, the issue of whether consultation is complete is before this Court. The USFS has taken ten months to reach this point.
>
> At a recent hearing, USFS mentioned the urgency of lifting the ban on timber activities and requested that the parties act quickly, noting that the timber industry and related jobs

> are stalled. *The Court is deeply concerned about the impact of this situation, but finds that the USFS is the culprit before the timber industry for the delays, not the Court.*

(Pl.'s Cross-Mot. at App. 581) (emphasis added).

On September 17, 1996, the Arizona district court formally held that the consultations were not completed upon the submission of the BOs. (Pl.'s Cross-Mot. at 583-84.) *Id.* The court specifically found that the BO on the existing LRMPs was still legally deficient in three of the four major required areas to be addressed in a Biological Opinion. *Id.* Accordingly, the court held that, "[u]ntil the consultation is completed by the submission of complete BOs, the injunction remains in effect." *Id.* However, the court also stated its belief that the remaining issues should be "addressed within weeks and the Biological Opinions resubmitted so that the stipulated injunction can lift as soon as possible." *Id.* The Forest Service did not appeal this ruling.

During this time the Forest Service was made aware that the facilities of the Plaintiff in this case had been shut down by the suspension, as the Plaintiff sent a letter to the Regional Forester to this effect. (Pl.'s Cross-Mot. at 589.) On November 12, 1996, the court opined at a hearing that the consultation process was too slow and that third parties were being harmed by the continued delay:

> [Q]uite frankly, I don't think the manner in which the litigation is cast has appropriate incentives for the parties to resolve it and that third parties are being injured while the

> litigants really have not much at stake one way or the other and don't seem much – and don't seem to be working as diligently as they should to bring a resolution to it. And so the Court will try to find alternative methods of bringing appropriate pressure to bear on the parties if that's what needs to be done and to relieve pressure on those parties who are being injured by inaction by the parties to the litigation.

(Pl.'s Cross-Mot. at App. 595-96.)

The next day, notwithstanding the court's repeated findings that the parties, including the Forest Service in particular, were to blame for the delays in the litigation, the Forest Service filed an expedited motion to declare consultations to be complete by arguing, among other things, that "the current injunction has paralyzed the timber industry in Arizona and New Mexico" and stated further that "[s]imply put, the injunction has caused serious impacts to the communities that rely upon timber products in the Southwest. It is time to end the injunction." (Pl.'s Cross-Mot. at App. 599.)

On November 26, 1996, the Forest Service delivered a new final BO to the environmental plaintiffs. (Def.'s Mot. at App. 89.) On December 4, 1996, the court held that the BOs were legally sufficient and consultation had been completed. (Def.'s Mot. at App. 90-92.) In this order, the court stated, "the court further finds that the consultations are concluded and that the injunction against tree-cutting activities should be terminated." (Def.'s Mot. at App. 91.)

Subsequently, the Forest Service lifted the suspensions on the timber sales contracts. The Plaintiff alleges, however, that the lifting of the suspensions occurred after the close of the Normal Operating Season on all but one of the contracts and harvesting could not recommence until the spring of 1997. (Pl.'s Cross-Mot. at App. 614-15.)

E. The Plaintiff's Submitted Claims

The Plaintiff submitted claims to the contracting officer claiming that the Forest Service was liable for the suspensions as follows:

Contract	Amount	Date
1) O.D. Ridge	$676,937.98	November 19, 1997
2) Kettle	$766,854.59	November 19, 1997
3) Hay	$3,258,138.42	November 10, 1997
4) Brookbank	$891,779.62	November 17, 1997
5) Jersey Horse	$371,664.50	November 17, 1997
6) Salt	$614,598.23	November 17, 1997
7) Manaco	$757,688.89	November 17, 1997
8) St. Joe	$1,135,725.75	November 17, 1997
9) Hutch-Boondock	$1,014,227.92	August 15, 1997
10) Mud	$1,223,558.07	August 15, 1997
11) Saginaw-Kennedy	$576,767.83	August 15, 1997
12) Brann	$568,243.49	October 15, 1997
13) U-Bar	$853,854.44	August 15, 1997
14) Monument	$387,169.89	August 15, 1997

(Pl.'s Compl. ¶¶ 77, 78, 91, 92, 108, 109, 127, 128, 142, 143, 157, 158, 172, 173, 188, 189, 208, 209, 223, 224, 238, 239, 253, 254, 269, 270, 284, 285.)

In response to Precision Pine's claims, the contracting officer issued final decisions finding entitlement as follows:

Contract	Amount	Date
1) O.D. Ridge	$1,776.41	January 15, 1998
2) Kettle	$1,850.87	March 16, 1998
3) Hay	$0.00	January 15, 1997
4) Brookbank	$2,627.78	March 16, 1998
5) Jersey Horse	$1,661.01	March 16, 1998
6) Salt	$1,372.51	March 16, 1998
7) Manaco	$663.31	March 16, 1998
8) St. Joe	$0.00	March 16, 1998
9) Hutch-Boondock	$131.23	December 1, 1997
10) Mud	$926.61	December 1, 1997
11) Saginaw-Kennedy	$357.22	November 28, 1997
12) Brann	$44.62	November 28, 1997
13) U-Bar	$6,553.66	December 1, 1997
14) Monument	$277.55	December 1, 1997

(Pl.'s Compl. ¶¶ 80, 94, 111, 130, 145, 160, 175, 191, 211, 226, 241, 256, 272, 287.)

II. Motion to Dismiss

A. Standard

The Court of Federal Claims is a court of limited jurisdiction. *United States v. King,* 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *American Maritime Trans., Inc. v. United States,* 870 F.2d 1559, 1563 (Fed. Cir. 1989). Absent congressional consent to entertain a claim against the United States, this court lacks authority to grant relief. *United States v. Testan,* 424

U.S. 392, 397-98, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). This court is statutorily precluded from possessing subject matter jurisdiction to hear claims in tort. *See* 28 U.S.C. § 1491(a)(1) ("the United States Court of Federal Claims shall have jurisdiction . . . in cases not sounding in tort").

"[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *accord Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989). However, it is the plaintiff's burden to plead and to prove the requisite jurisdictional facts to establish the court's jurisdiction. *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In rendering a decision, the court must presume that the undisputed factual allegations included in the complaint by a plaintiff are true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

B. The Plaintiff's Complaint Does Not Sound in Tort and States a Claim for Which Relief Can Be Granted.

The Defendant argues that the complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim. Since both arguments are related and the Court rejects both of them for similar reasons, they will be discussed together. First, the Defendant argues that the essence of the Plaintiff's

complaint is that the Forest Service failed in its duty to correctly implement the mandates of the ESA in Region 3, because the Forest Service is obliged to comply with the mandates of the ESA as part of its official duties.[23] Thus it argues that the Plaintiff's claim sounds in tort, requiring its dismissal for lack of jurisdiction.[24] Second, the Defendant's counsel, at oral argument, (for the first time) argued that the action should be dismissed for failure to state a claim on the grounds that the contract did not explicitly incorporate a duty to abide by the terms of the ESA and its implementing regulations. It cited a string of cases for the proposition that a contractor cannot bring suit against the Government for violation of a statute or regulation unless the regulation exists for the benefit of the contractor: *Freightliner Corporation v. Caldera,* 225 F.3d 1361, 1365 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton,* 126 F.3d 1442, 1451-52 (Fed. Cir. 1997); *Rough Diamond Co. v. United States,* 173 Ct. Cl. 15, 351 F.2d 636 (1965). Clearly, section 7 of the ESA, which required the Forest Service to consult with the Fish and Wildlife Service for its existing LRMPs, does not exist for the benefit of the Plaintiff, but instead is

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[23] *Sierra Club v. Babbitt,* 65 F.3d 1502, 1504-05 (9th Cir. 1995) ("section 7(a)(2) of the ESA imposes a procedural duty on Federal agencies to consult with the [FWS] before engaging in a discretionary action which may affect a particular species").

[24] The Defendant, at oral argument, appeared to withdraw its claim that the Plaintiff's complaint sounds in tort, but the withdrawal was in itself somewhat ambiguous. (Tr. at 13-14.) However, because the Court is required to dismiss the action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter" under RCFC 12(h)(3), the issue will nevertheless be decided by the Court.

designed to preserve the ecosystems upon which endangered species and threatened species depend and to achieve the purposes of various international treaties. 16 U.S.C. § 1531(b).

Nevertheless, the Court finds the Plaintiff's arguments against dismissal to be convincing. Its arguments are summarized and evaluated below. The Plaintiff claims that the Forest Service's suspension or delay of the contracts during the course of the *Silver v. Thomas* litigation and misrepresentations contained within the contract concerning the protective measures required by the ESA breached its implied obligations to cooperate and not to hinder the performance of the contracts. The Plaintiff makes two essential arguments for these claims. First, it claims that Clause CT 6.25 (7/86), included in all 14 contracts at issue, warranted that the Forest Service had identified the measures that were necessary for the protection of species under the ESA including the Mexican spotted owl and had included those measures in the contract. Clause CT 6.25 states in relevant part:

> Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this sentence or are as follows . . . .

(Def.'s Mot. at App. 2.) However, according to the Plaintiff, the Forest Service had not included all of the information necessary for it to make the

representations that it included in its disclosures of special measures for protection of threatened species because it did not comply with its legal obligations under the ESA to consult with the FWS and to incorporate any existing results from the consultations into CT 6.25. Because the Forest Service had failed to consult with the FWS, so the Plaintiff argues, the warranties were misleading and the subsequent suspensions to correct the misrepresentations contained in the warranties were a breach of the express warranties contained within CT 6.25. Second, it argues that it is well-established that implied obligations exist in every government contract, including those of the implied duties to cooperate and not to hinder the performance of the other party, and that the delays imposed by the Forest Service when the contracts were suspended were unreasonable and breached these implied duties.

The Defendant relies on *Sunrise Village Mobile Home Park, L.C. v. United States,* 42 Fed. Cl. 392, 405 (1998), for the proposition that if a claim for money damages could be construed to arise from wrongful or negligent conduct of the Government in the course of discharging its official duties, then the claim sounds in tort. However, the precedent in this Circuit clearly demonstrates that such a proposition is overstated. For instance, the Tucker Act has been interpreted to hear tortious breaches of contract that are connected by some nexus with a breach of a substantive contractual obligation. *Olin Jones Sand Co. v. United States,* 225 Ct. Cl. 741, 745 (1980) ("Insofar as plaintiff's references to defendant's alleged misrepresentations are merely another way of asserting that a breach of contract had occurred, the . . . claim is not barred simply because it might also be

stated as a tort.") *See also D.F.K. Construction Corp. v. United States,* 45 Fed. Cl. 280, 284-85 (1999); (an allegation that the Government misrepresented weather conditions at construction site is a valid contract claim) *C.B.C. Enterprises v. United States,* 24 Cl. Ct. 1, 5 (1991); *Summit Contractors, Inc. v. United States,* 22 Cl. Ct. 54, 56-57 (1990). Consequently, a misrepresentation claim, which the Plaintiff seeks in this case, is a tortious breach of contract claim that can be heard by this Court. *Summit Timber Co. v. United States,* 230 Ct. Cl. 434, 677 F.2d 852, 856 (1982); *Chris Berg, Inc. v. United States,* 186 Ct. Cl. 389, 404 F.2d 364 (1968). The representations or alleged warranties contained within clause CT 6.25 provide the basis for a sufficient nexus between the wrongful act and the contract that is necessary for the Court to have jurisdiction over this claim.

Furthermore, there can be little doubt that the implied duties to cooperate and not to hinder are read into contracts with the Federal Government and are binding on the parties as if they were expressly written into the contract. *Cedar Lumber, Inc. v. United States,* 5 Cl. Ct. 539, 549 (1984); *Kehm Corp. v. United States,* 119 Ct. Cl. 454, 469, 93 F. Supp. 620 (1950); *George A. Fuller Co. v. United States,* 108 Ct. Cl. 70, 96, 69 F. Supp. 409 (1947) (Government is liable for delays caused by it even in the absence of an express contractual provision.) *See also* Restatement (Second) of Contracts § 205. Almost any conceivable claim for breach of an implied duty to cooperate and not to hinder could be construed or characterized as a tort claim. If this Court had to dismiss any case for lack of subject-matter jurisdiction merely because the claim could be characterized as a tort, no contractor could ever bring an action for breach of an implied duty. A

more sensible approach in determining whether a particular cause of action lies within the jurisdiction of this Court is to inquire into the nature of the substance of the claim itself as opposed to how the form of the cause of action could be characterized. *Hartle v. United States*, 18 Cl. Ct. 479, 482 n. 6 (1989); *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 525 (1986).

For the purposes of resolving whether this Court has jurisdiction in this case or whether the Plaintiff has stated a claim for which this Court may grant relief, it makes no real difference whether the Defendant characterizes its objections to the claims of the Plaintiff as a failure to incorporate into the subject contracts a statute which was enacted for the benefit of the contractor or that the claims more properly sound in tort rather than contract or (as will be explained *infra* § V(B)) that supposedly implied obligations of the Government predicated upon its statutory or regulatory obligations cannot lie when an express term dealing with the same subject matter is contained within the contract. All of the objections raised by the Defendant point towards essentially the same problem; namely, how to properly balance the protection of the reasonable expectations of contractors and the protection of the Government's right and duty to carry out its functions when a seeming breach of contract by the Government was caused by the (alleged) failure of the Government to comply with its statutory obligations. However, this Court cannot agree with the Defendant that this dilemma should be resolved by relieving the Government from contract liability in each and every case when the cause of a breach of contract is a failure of the Government to abide by its statutory or regulatory duties.

Instead, the Plaintiff correctly sees its claim through the lens of the implied duties to cooperate and not to hinder which exist in every contract. There are several reasons why the Plaintiff should be permitted to pursue its claim. First, the Plaintiff is not claiming that the Forest Service breached its implied duties merely by failing to abide by its statutory duties in some manner unconnected or unrelated to the performance of the contract. Rather, it alleges that the unreasonable failure of the Forest Service to engage in formal consultation as required by section 7 of the ESA, from the time of the listing of the Mexican spotted owl, caused the suspension of the contracts. (Pl.'s Compl. ¶ 11.) An allegation that the Government unreasonably caused a delay in the performance of a contract is a classic breach of implied duty action, albeit with the additional twist that the unreasonable delay caused by the Government's conduct had significance insofar as the conduct was contrary to its statutory duty. Thus, the Plaintiff is not, strictly speaking, incorporating the provisions of the ESA into the contract nor does it need to incorporate the provisions of the ESA into the contract in order to bring an implied duty action in this instance.[25]

Second, with respect to its claim for breach of an express warranty, the Plaintiff does not appear to

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[25] Of particular significance in this case is that the key inquiry upon which this case turns is not whether the Forest Service violated section 7 of the ESA when it failed to submit its Forest Plans for consultation. The Arizona district court has already determined that the Forest Service did violate the law. Instead, this Court determines whether the government's failure to submit its Forest Plans for consultation was reasonable under the circumstances.

incorporate the ESA and the regulations into the contract either, as the Defendant characterizes the argument. Instead, the Plaintiff argues as follows, "Until the consultation on the Plans was complete, the Forest Service's representations in CT 6.25 that based on all information readily available at the time no further protective measures were required was [sic] simply not accurate. Thus, the misrepresentations, and the suspension that was necessary to correct them, breached Precision Pine's contracts." (Pl.'s Cross-Mot. at 11.) In this particular instance, the Plaintiff argues that the Forest Service could not have made the representations on reasonably reliable information because it did not and could not have known what additional measures were necessary, if indeed any further measures were necessary, because the Forest Service did not consult with the FWS as it was supposed to do.

Third, the Defendant states no precedent (and the Court has not been able to find any) that a contractor can never recover for any unreasonable delays in contract performance that are directly caused by an act (or failure to act) by the Government that is contrary to a statute or regulation under a claim for breach of an implied duty to cooperate and not to hinder. It is arguable from a policy standpoint, perhaps, that such a categorical exemption is necessary in order to prevent a flurry of claims against the Government in which creative litigants shoe-horn claims for violation of statutory duties, of dubious relation to a contract, into a breach of implied duty action. However, it would be odd that a breach of an implied duty claim against the Government could lie if the breach was caused by an act (or failure to act) that was legal, but the Government could escape

contract liability if the breach were caused by an act (or failure to act) that was contrary to law. Moreover, there is no reason why this Court is not capable of using standard norms of contract interpretation and classic implied-contract theories to determine whether a claim for delay caused by an agency's course of action, contrary to law, is meritorious. Since there is apparently no precedent in this Circuit for such a categorical rule, the Court will find that the Plaintiff has stated a claim.

The Defendant is incorrect that *Smithson v. United States*[26] dictates that the Plaintiff's case sounds in tort. *Smithson* involved an allegation that FmHA regulations were incorporated into a loan agreement and that violation of the same regulations breached the agreement. However, the *Smithson* decision noted that there was no finding that the FmHA had engaged in arbitrary, capricious, or culpable conduct. *Smithson*, 847 F.2d at 794. Because the Plaintiff in this instance does allege that the failure of the Forest Service to consult was arbitrary and beyond the reasonable scope of actions contemplated by putative exculpatory provisions of the contracts (and because the Plaintiff does not and need not incorporate the ESA into the contract), the complaint is outside the scope of the holding of *Smithson*. Further, unlike *Somali Dev. Bank*[27] where the Court of Claims found that the plaintiff's claim that the Government breached a statutory duty owed to it sounded in tort, the Plaintiff in the present case does not allege that the Forest

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[26] 847 F.2d 791 (Fed. Cir. 1988).

[27] 205 Ct. Cl. 741, 508 F.2d 817 (1974).

Service owed it a statutory duty to comply with the ESA. *Somali Dev. Bank,* 205 Ct. Cl. at 747, 508 F.2d 817. Instead, the Plaintiff claims that the Forest Service breached the contracts at issue by its unreasonable delay of the Plaintiff's performance of the contracts and that clause CT 6.25 which disclosed protective measures necessary to comply with the ESA was misleading, both of which were caused by the Forest Service's failure to consult with the FWS as required by section 7 of the ESA.

Neither does *Smithson's* predecessor, *Nutt v. United States,*[28] provide any applicable rationale for the result which the Defendant seeks. *Nutt* observed the following:

> Since the Government can incur money damages in a contract action, the Government will be held to have obligated itself in contract only upon a showing of an express or implied-in-fact agreement to do so. This formidable standard serves to protect the fisc from all suits under contract claims except where the evidence guarantees that the Government has agreed to waive its sovereign immunity . . . . It also assures a necessary measure of flexibility to the Government in its daily operations so that it need not answer in damages for each false step or innocent legal error in administering the myriad of programs and functions that occupy its efforts.

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[28] 12 Cl. Ct. 345 (1987); *aff'd, Smithson v. United States,* 847 F.2d 791 (Fed. Cir. 1988).

> The distinction between these two sorts of actions and their respective remedies is essential to the proper balance between protecting the justifiable, bargained-for expectations of the public and the proper exercise of discretion necessary to the smooth and efficient operation of the Government. It is important that a mere reference in the contract to the controlling regulations not be converted into a contractual promise at the risk of subverting this crucial distinction.

Nutt, 12 Cl. Ct. at 350-51. However, at the heart of the dispute in the present case is whether the Forest Service reasonably administered the contracts at issue by suspending them. The issue of whether the Forest Service failed to submit its LRMPs as required by section 7 of the ESA in a timely fashion is directly tied into the Forest Service's administration of the contracts. Furthermore, there is no implicit sovereign immunity difficulty that worried the *Nutt* court in this case, because it is undisputed that the Tucker Act covers the implied duties to cooperate and not to hinder contracts.

Moreover, it would be inappropriate to apply, in this particular case, the line of precedent emanating from *Rough Diamond* which holds that a contractor cannot bring an action against the Government for its failure to abide by a statute that was not enacted for the contractor's benefit. Unlike in the case at bar, the contractors in *Rough Diamond* attempted to incorporate the duties of the statute into the contract. More importantly, none of these cases cited by the Defendant alleged a breach of an implied duty to cooperate and not to hinder the contracts. Instead,

these cases involved claims for an equitable adjustment, *Freightliner*, 225 F.3d at 1364, an ineffective exercise of an option to extend a contract, *Cessna Aircraft Co.*, 126 F.3d at 1445-46; and a claim for damages from a barter in which the value of the goods exchanged related to an legally incorrect reference price. *Rough Diamond*, 173 Ct. Cl. at 17, 351 F.2d 636. The difference between these precedents and the case at bar is the role which the statute or regulation plays in the context of the case. The line of inquiry in the cited cases; namely, whether the statutes in question granted these contractors "litigable rights," *Id.* at 33, 351 F.2d 636, is not the relevant starting point in an allegation of a breach of an implied duty to cooperate and not to hinder. Instead, the key inquiry in an action for a breach of an implied duty action is whether the course of action (or non-action) taken by the Government unreasonably caused a delay in the performance of the contracts. *George A. Fuller Co.*, 108 Ct. Cl. at 96, 69 F. Supp. 409 (1947); *C.J. Betters Corp.*, 25 Cl. Ct. 674, 677 (1992) (*quoting Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955)) ("The rule in this Circuit is that the efficacy of a limitation of liability clause does not extend to those situations where the breach, whether total or partial, arises out of the events within the Government's control."). In the present case, of course, the breach was allegedly caused by a failure to timely submit Forest Plans for consultation as required by section 7 of the ESA. The Court, again, sees no reason why it must divide allegations of a breach of an implied duty between those delays or misrepresentations that are not caused by a statutory or regulatory violation, for which the Defendant would (presumably) allow this Court to grant relief, and those delays or misrepresentations

caused by an act or omission that violates a statute or regulation, for which the Defendant would deny that this Court could grant relief.

Furthermore, it is significant that the Plaintiff's complaint does not say that the failure of the Forest Service to abide by its statutory duty to consult with the FWS breached the contract. Instead it claims that "the unauthorized and unreasonable suspension of the Contracts resulted in damages to Precision Pine." (Pl.'s Compl. ¶ 59.) The failure of the Forest Service to engage in consultations with the FWS was, in the words of the Plaintiff, the cause of the breach, but not the breach itself.[29] The occasion of the breach would naturally be the improper suspension of the contracts.

Construing the allegations in the complaint favorably towards the Plaintiff, the Court finds that the allegations are in fact contractual claims. Therefore, the Court finds that it does have subject matter jurisdiction over the contracts at issue and that the Plaintiff has stated a claim for which the Court has jurisdiction and for which relief can be granted.

Accordingly, the Court DENIES the Defendant's motion to dismiss the case for lack of subject matter jurisdiction or failure to state a claim. The Court now turns to the substantive issue of whether the Forest

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[29] *See also* Pl.'s Reply in Support of its Cross Motion at 17 (". . . Precision is not arguing that the Forest Service's failure to comply with the ESA and its implementing regulations breached the contracts . . . . the matter squarely presented by Precision for this Court to decide is whether or not the 16 month delay of Precision's operations violated the Forest Service's implied duty to cooperate and not to hinder Precision's operations.")

Service breached the contracts when it suspended them.

III. Standard for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986); *Jay v. Secretary, DHHS*, 998 F.2d 979 (Fed. Cir. 1993). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1307 (Fed. Cir. 1998), and draw all reasonable inferences in its favor. *See Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995).

The fact that both parties have moved for summary judgment is not an admission that no material facts remain in issue. *Massey v. Del Laboratories, Inc.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997). *See also Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988). Summary judgment will not necessarily be granted to one party or another simply because both parties have moved for summary judgment. *Corman v. United States*, 26 Cl. Ct. 1011, 1014 (1992). A cross-motion is a party's claim that it alone is entitled to summary judgment. *A Olympic Forwarder, Inc. v. United States*, 33 Fed. Cl. 514, 518 (1995). It therefore does not follow that if one motion is rejected, the other

is necessarily supported. *Bubble Room, Inc. v. United States*, 159 F.3d 553, 561 (Fed. Cir. 1998). Rather, the court must evaluate each party's motion on its own merit and resolve all reasonable inferences against the party whose motion is under consideration. *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 671 (1997).

The Court reviews decisions by a contract officer and allegations that a party did not fulfill its obligations under a contract on a *de novo* basis. 41 U.S.C. § 609(a)(3). *County of Suffolk, N.Y. v. United States*, 19 Cl. Ct. 295, 299 (1990).

IV. The Forest Service Possessed Authority To Suspend Timber Contracts

The Defendant claims that clauses CT 6.01 and CT 6.25 specifically give the Forest Service the authority to suspend the contracts at issue. In determining whether these clauses authorized the Forest Service to suspend contracts, "the primary objective of contract interpretation is to ascertain the intent of the parties at the time they entered the contract." *Ralden Partnership v. United States*, 891 F.2d 1575, 1578 (Fed. Cir. 1989). The first step in ascertaining the intent of the parties is to look to the plain language of the contract. *Massie v. United States*, 166 F.3d 1184, 1189 (Fed. Cir. 1999); *Gould v. United States*, 935 F.2d 1271 (Fed. Cir. 1991). If the meaning of the plain language of the statute is clear, then there is no need to consider extrinsic evidence in determining the meaning of a term. *HRE v. United States*, 142 F.3d 1274, 1276 (Fed. Cir. 1998).

There can be no doubt that clause CT 6.01, contained in all contracts at issue save the Hay timber sale contract, specifically authorizes unilateral suspension of the contracts in the event of a court order. Likewise, all contracts, including the Hay timber sale contract, contained clause CT 6.25, which implicitly grants the Forest Service the authority to unilaterally suspend the contracts at issue, since it provides that the Forest Service can cancel or modify the contracts and provide additional protection for endangered or threatened species. In light of the requirement of section 7 of the ESA not to make an "irreversible or irretrievable commitment of resources" during the period of consultation, any interpretation of clause CT 6.25 that would not permit a suspension during the consultation period would render the terms of the clause ineffectual for its designed purpose. *Scott Timber v. United States,* 40 Fed. Cl. 492, 502-03 (1998), *vacated on other grounds,* 44 Fed. Cl. 170 (1999). Although the Forest Service Manual contemplates a distinction between a suspension and a modification of a contract,[30] it is more sensible to read CT 6.25 as providing the Forest Service with the authority, within reason, to preserve the status quo in

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[30] With respect to modifications and suspensions of timber sale contracts, the Forest Service Manual states that "when unforeseen conditions arise after the contract approval, the Contracting Officer may negotiate mutually agreeable modifications." *See* Forest Service Manual ("FSM") § 2453.22, Pl.'s Cross-Mot. at App. 74. The Forest Service Manual also contemplates a suspension to be outside the scope of a modification. "Forest officers shall not unilaterally, suspend, delay, or otherwise discourage or impair operations on a contract being processed for environmental modification." *See* FSM § 2453.24, Pl.'s Cross-Mot. at 75.

the forests, i.e., restraining any timber harvesting activities, until either consultations are complete and/or the Forest Service decides whether the contracts should be cancelled, modified, or performed without change. *Id.*

While both clauses CT 6.01 and CT 6.25 provide the Forest Service with unilateral authority to suspend the contracts at issue, the clauses do not provide it with *unlimited* authority to suspend the contracts at issue, as shall be discussed below. If the Forest Service sought to exculpate itself from delays or misrepresentations caused by conduct within the Government's own control, there would need to be a clear expression of that intent in clauses CT 6.01 and CT 6.25. "It is not only reasonable, but it is required that where the government intends to exculpate itself from liability for its breach of contract, it must manifest that intent in direct and express language." *Dept. of Natural Resources and Conservation of Mont. v. U.S.*, 1 Cl. Ct. 727, 734 (1983); *see also Cedar Lumber, Inc. v. United States*, 5 Cl. Ct. 539, 552 (1984) ("when the government intends to disclaim liability for breach of contract, it must employ clear and express language to effectuate its intent"). However, nowhere in Clauses 6.01 and CT 6.25 is such language to be found.

Therefore, the Forest Service's right to suspend the contracts is subject to a rule of reasonableness. *Scott Timber*, 40 Fed. Cl. at 504. In order to determine whether the circumstances were reasonable, it is necessary to address in some detail the issue of how contractual clauses which provide express authority to suspend are to be interpreted in the light of the

implied duties to cooperate and not to hinder the contracts.

V. The Express Right to Suspend the Contracts is Interpreted in Light of the Implied Duties to Cooperate and Not to Hinder

A. Standard for Finding a Breach of the Implied Duties to Cooperate and Not to Hinder

As stated above, there is no dispute that the implied duty to cooperate and the implied duty not to hinder performance of contracts (both being subspecies of the implied duty of good faith) are present in all government contracts.[31] The Court, in determining whether the Government had breached its implied duty to cooperate and not to hinder, will use the standard set out in *Cedar Lumber, Inc.*, 5 Cl. Ct. at 549, 550 (1984). If the contract contains a specific warranty, a breach of that warranty breaches the implied duty to cooperate. *Id.* at 549 (*citing United States v. Howard P. Foley, Co.*, 329 U.S. 64, 107 Ct. Cl. 710, 67 S.Ct. 154, 91 L.Ed. 44 (1946)); and, even if

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[31] The implied duties to cooperate and not to hinder are two separate, albeit related, implied duties. *Walter Dawgie Ski Corporation v. United States*, 30 Fed. Cl. 115, 130 (1993). If the Government takes an action that is wrongful or otherwise engages in "active interference," it will be held to have breached the implied duty not to hinder the performance of the contracts. If the Government fails to take essential action, or when the Government's conduct during contract performance is unreasonable such as failing to help in a solution of a problem that has arisen in contract performance, it will be said to have breached its implied duty to cooperate with the performance of the contract. *See* Cibinic & Nash, Administration of Government Contracts 297 (3d Ed. 1995).

there is no specific warranty, an unreasonable delay that is caused in some way by the Government can breach the implied duty not to hinder. *Id.* However, in order for a delay to give rise to a breach of the implied duty to cooperate, the contractor must satisfy two elements. First, the contractor must prove that the cause of the delay was the fault of the Government. *Id.* at 550 (*citing Koppers/Clough v. United States,* 201 Ct. Cl. 344, 363 (1973)); *L.L. Hall Construction Co. v. United States,* 177 Ct. Cl. 870, 879, 379 F.2d 559 (1966). Second, the delay must be of sufficient magnitude and the delay must be of a sufficient hindrance to the operations of the contractor to constitute a breach. *Id.* (*citing Lewis-Nicholson, Inc. v. United States,* 213 Ct. Cl. 192, 199, 550 F.2d 26 (1977)). Therefore, the Court must examine the "particular contract, its context and its surrounding circumstances." *Id.* (*quoting Commerce International Co. v. U.S.*, 167 Ct. Cl. 529, 536, 338 F.2d 81 (1964)). A minor delay does not constitute a breach of the implied duty to cooperate.[32] *Id.*

B. The Right to Suspend Is Qualified by the Implied Duty Not to Hinder

As the Court decided above, clause CT 6.01 of the 13 non-Hay contracts gives the Forest Service the right

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[32] In addition, *Cedar Lumber* teaches that in order to recover, the Plaintiff must show that delays caused material damage. *Id.* (*citing Commerce International,* 167 Ct. Cl. at 542, 338 F.2d 81.) However, it is not necessary to prove material damage in order to establish liability for breach of the implied duty not to hinder. The extent to which the Plaintiff suffered material damage as a result of the breach of the implied duty not to hinder shall be determined later during the damages phase of this case.

to suspend the contracts to comply with a court order that is issued by a court of competent jurisdiction. *See supra,* § V. Likewise, clause CT 6.25, contained in all 14 contracts at issue, gives the Forest Service implicit authority to suspend the contracts. *Id.* This right to suspend, however, is not only qualified by its own terms, but also by implied duties. The Government could not suspend if, or to the degree that, the suspension was due to a breach of the implied duty to cooperate and not to hinder the contracts. Barring an exculpatory clause which clearly and expressly states otherwise, this Circuit has consistently held that delays caused by the Government breach the duty not to hinder the contracts. *James Stewart & Co. v. United States,* 105 Ct. Cl. 284, 328, 63 F. Supp. 653 (1946). *See also C.J. Betters v. United States,* 25 Cl. Ct. 674, 677 (1992) ("The rule in this Circuit, then, is that the efficacy of a limitation on liability clause does not extend to those situations where the breach, whether total or partial, arises out of events within the Government's control."). Thus, in this section the Court analyzes the Defendant's exercise of the right to suspend in light of the implied duty not to hinder.

In determining whether the Defendant breached the implied duty not to hinder, the Court is neither varying a term of the contract by extrinsic evidence, nor reading any terms out of the contract, as the Defendant contends. Instead, the Court is interpreting clauses CT 6.01 and CT 6.25 in light of another term of the contract, namely, the implied term that creates the duty not to hinder. In doing so it is following the accepted canon of construction that a court ought to construe contract clauses harmoniously with one another. *McAbee Const., Inc. v. United States,* 97 F.3d 1431, 1435 (Fed. Cir. 1996) ("We must interpret the

contract in a manner that gives meaning to all of its provisions and makes sense.").

The Defendant appears to argue that the Court cannot hold that the Forest Service's failure to comply with the ESA resulted in unreasonable delay such that it breached the implied duty not to hinder, unless the contract contains a specific provision that binds the Forest Service to comply with the ESA. (Def.'s Mot. at 24-25.) But it is difficult to see, logically, why it should matter whether the unreasonable delay was caused by failure to comply with a statute or for any other reason-what matters is whether the delay was unreasonable. Furthermore, the cases cited for this proposition by the Defendant in its brief do not support it. As stated earlier in § II(b), *supra*, the Plaintiff is not alleging that there is an implied duty to comply with the ESA as such. Instead, in this instance, it is alleging that the unreasonable failure of the Forest Service to submit its LRMPs to the FWS for consultation under section 7 of the ESA resulted in a wrongful suspension that constituted a breach of the implied duty not to hinder.

The Defendant cites the Court of Federal Claims case of *State of Alaska v. United States*, 35 Fed. Cl. 685 (1996) in support of the argument that Government liability must hinge on an express obligation to comply with a statute. That case is not binding precedent on this Court, and it is not really on point, since it did not concern the precise issue in this case, that is, unreasonable delay caused by a failure to comply with an applicable statute that results in a breach of the implied duty not to hinder. It merits some attention, however, because it did concern the more general issue

of the interpretation of a contact provision in light of the implied duty of good faith and fair dealing.

Specifically, the case concerned an attempt by Alaska to bootstrap a provision of the Alaska Statehood Act (which the court found to be binding in contract), which provided that the state could share in the revenue from mineral exploitation of federal lands, into an obligation to open up specific federal lands for mineral development. This Court has no quarrel with the holding in *Alaska* that the implied duty (of good faith and fair dealing in that case) could not be stretched that far. However, in arriving at its decision, the *Alaska* district court opined:

> The implied obligation of good faith and fair dealing must attach to a specific substantive obligation, mutually assented to by the parties. In the present case, however, Alaska would have the implied duty of good faith and fair dealing create by implication an express [sic] obligation to open up specific federal lands to generate additional revenue for the State.

Id. at 704. The Defendant focuses on the first sentence of this quotation in support of its proposition that "there cannot be a breach of an implied duty absent a specific contractual obligation which incorporates the requirements of the ESA into Precision Pine's timber sale contracts." (Def.'s Mot. at 24.)

But it is difficult to understand what the court meant. The revenue-sharing provision seems to be a substantive obligation (the obligation to share revenue) mutually assented to by the parties; therefore, the first sentence does not seem to support

the court's conclusion. Furthermore, it seems odd that Alaska would attempt to find an *express* obligation by means of an *implied* duty. Rather, as the *Alaska* district court stated earlier, Alaska was asking the court to determine "if the revenue sharing provision [of the statute] carried with it an implied duty to develop and manage Federal mineral lands in such a way as to maximize the amount of revenue Alaska would receive." *Id.*

The court's statement, in the indented paragraph above, does not provide a very helpful rule in determining the limits of the implied duty. *Any* obligation imposed by the implied duty of good faith and fair dealing could be characterized as creating by implication an obligation that is not found expressly in the contract. Perhaps what the court meant was that Alaska was attempting to create a new independent promise rather than allowing the implied duty to merely monitor the performance of an existing promise. If so, the case at bar can be distinguished from *Alaska* because in *Precision Pine* the implied duty not to hinder functions as a monitor of the manner in which the existing right to suspend may be exercised; it does not create a new independent promise.

This Court believes that it is impossible to formulate rigid rules as to which provisions of a government contract the implied duty is to apply or as to the scope of the implied duties. Instead, it agrees with Professor Van Alstyne, who wrote: "The precise interaction of the duty of good faith with express contract language . . . remains an important jurisprudential mystery." Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith,* 40 Wm. & Mary L.Rev. 1223, 1227 (1999). As such, the scope of

the implied duty must be resolved on a case-by-case basis. The implied duty to cooperate and not to hinder (or the implied duty of good faith and fair dealing) allows a court to monitor how a promise is performed or right exercised so that it is consistent with the ordinary expectations of parties to such a contract, objectively judged. 3 *Corbin on Contracts,* § 570(A) (Supp. 2000) ("What courts are doing here [in recognizing implied duties] . . . is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiated about these expectations"); *Restatement (Second) of Contracts,* § 205 cmt. a ("Good faith performance . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."). In *Alaska,* the plaintiff was attempting to change a promise to share revenue into a duty to maximize the revenue to be shared. There was no allegation that the revenue that was received from federal mineral lands was improperly handled. The case at bar, by contrast, deals squarely with the *proper* exercise of the right to suspend.

In scrutinizing the proper exercise of the substantive right to suspend the contract, the Court does not maintain that the Government may not suspend pursuant to court order.[33] It does not read CT 6.01 or CT 6.25 out of the contract or make the provisions otherwise meaningless. One can imagine

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[33] It is difficult to create an exact parallel between a case dealing with the exercise of a right and an affirmative promise. In the former, the person disadvantaged from the exercise would attempt to minimize the right; in the latter, the person benefitting from the promise would attempt to maximize it.

circumstances in which a suspension would not have occurred because of unreasonable delay. For example, a court could hold that the Forest Service could still suspend a timber sale contract pursuant to a court order whose purpose was to preserve the status quo before the Plaintiff engaged in operations without a finding that the Forest Service had violated a statute or regulation. *Scott Timber,* 44 Fed. Cl. at 172. Further, even if the Forest Service had violated a statute or regulation, this would not ipso facto mean that there was an unreasonable delay.[34]

Defendant cites *C.B.C. Enterprises* for the same proposition as it does *Alaska,* but its argument is still unavailing. In *C.B.C. Enterprises,* a contractor sued for a breach of the implied duty to cooperate and not to hinder because it incurred costs defending itself against a criminal investigation and debarment proceedings based upon unfounded allegations. The *C.B.C. Enterprises* court noted that the implied duty to cooperate and not to hinder could not be stretched that far. "Plainly, the Government has the right to initiate debarment proceedings and undertake investigations concerning labor law violations. A charge that the Government's conduct was grossly improper and unsupportable would insinuate the court into wholly independent administrative procedures, far beyond the contract at issue." *C.B.C. Enterprises, Inc.,* 24 Cl. Ct.

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[34] For example, a contractor could not recover for the Government's violation of a statute or regulation that is wholly unrelated to the performance of a contract. Moreover, a violation of a statute or a regulation might result in a delay, but the delay itself might not be of unreasonable duration. If, for example, the delays in this case lasted for only a few days, the delays could hardly be characterized as unreasonable.

at 5. In this case, however, the Court is not delving into wholly independent administrative issues, nor is it seeking relief for damages incurred outside the scope of a contract claim. The *C.B.C. Enterprises* court clearly contemplated the possibility that a plaintiff might allege a breach of an implied duty not to hinder because the hindrance was expressed " in contract terms, for instance . . . that delays resulted." *Id.* In the present case, the Plaintiff is clearly alleging a breach of an implied duty in contract terms; namely, that the unreasonable delays in the performance of the contracts were caused by the Forest Service's unreasonable exercise of its right to suspend under CT 6.25 and CT 6.01.

The Defendant's reliance on *Price v. United States*, 46 Fed. Cl. 640 (2000), is likewise misplaced. Following the *Alaska* holding, *Price* held that the government did not have an implied duty to inform a purchaser of a property that there were code violations and ongoing demolition proceedings on the property both before and after the purchaser signed the contract. *Id.* at 651. However, unlike the present case, the express provisions of the contract in *Price* explicitly disclaimed any warranty on the code violations and shifted the responsibility for satisfaction of code violations to the purchaser. *Price,* in effect, stands for little more than the proposition that the Government can, by an express term, disclaim all liability for acts or delays caused by the Government. *Wells Bros. Co. of N.Y. v. United States,* 254 U.S. 83, 86-87, 41 S.Ct. 34, 65 L.Ed. 148 (1920). However, clauses CT 6.25 and CT 6.01 do not expressly state that the Forest Service will not be held liable for any damages resulting from any delays caused by the Forest Service. Hence, *Price* is inapposite to the present case.

The Defendant argues further that a duty to consult cannot be implied because it would conflict with the Government's right to suspend, and courts are not permitted to find an implied term in a contract that conflicts with an express one. (Def.'s Mot. at 25.) Again, this argument is incorrect. First, this Court is not implying a duty to consult as such. Instead, it holds that the delay was unreasonable under the circumstances of this case because it entailed failure to comply with a statute that required formal consultation. Second, insofar as the Defendant is arguing that the implied duty not to hinder is adding a new implied term, the answer is a simple one: The Court is not *adding* a new implied term to the contract nor is it reading any terms authorizing suspensions out of the contract. The Court is interpreting the right to suspend against the background of the implied duty not to hinder, which the Defendant admits is in all Government contracts. The cases and secondary authority that the Defendant cites – except for *Stafford v. United States,* 109 Ct. Cl. 479, 74 F. Supp. 155 (1947) – deal with *finding* a term by implication in a contract.[35] In such a case, it makes perfect sense that a court should not imply a term that conflicts with an express term. Again, this Court is not engaged in trying to see whether there is an implied duty not to hinder in this contract. Rather, it is applying the duty not to hinder, which is in every Government contract, to the Government's exercise of the right to suspend.

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[35] *ITT Federal Support Services, Inc. v. United States,* 209 Ct. Cl. 157, 168, 531 F.2d 522 (1976); *Chevron Chemical Corp. v. United States,* 5 Cl. Ct. 807, 811 (1984); 11 *Williston on the Law of Contracts* § 1295, at 34-35 (3d ed. 1968).

The *Stafford* case is relevant because it concerns a plaintiff who sought contract damages for delays in the face of an express contractual right of the Government to suspend performance of the contract. In that case, says the Defendant, the Court of Claims "refused to hold that the Government had breached an implied duty where the contractor suffered a delay when the Government exercised its contractual right to refuse to allow the contractor to proceed until the completion of another contract." (Def.'s Mot. at 27.) This may be, implicitly, the holding of the case, but the Defendant fails to point out that the Court rested its decision on the fact that the Government was not at fault in the delay: "There is no showing that the defendant's representatives were lacking in diligence in making the landscape work available . . . ." *Stafford,* 109 Ct. Cl. at 505, 74 F. Supp. 155. Later, the Court stated: "In the present case neither party was responsible for the substantial delay in the starting time for plaintiff's work which brought with it the added cost which plaintiff suffered." *Id.* at 505, 74 F. Supp. 155. Here, in contrast, the Plaintiff argues that the Forest Service is at fault in the delay. Therefore, the Defendant's reliance on *Stafford* is misplaced.

Next, in yet another variation on its theme that the Plaintiff is seeking to incorporate the ESA into the contract, the Defendant relies on *Scott Timber,* which, in turn, is based on *Smithson.* Of particular relevance is the following quote from *Scott Timber:*

> More importantly for purposes of this case, however, the Forest Service's obligation to complete the consultation process within 150 days arose, if at all, under section 7(b) of the ESA and not under the contracts at issue in this

> breach of contract case. Plaintiff has not identified any clause in the contract that could be construed to incorporate the ESA requirements into the contract. Therefore, the Court rejects any suggestion that the Forest Service's alleged failure to comply with the time period set forth in the ESA constitutes a breach of the contracts at issue in this case. *See Smithson v. United States*, 847 F.2d 791, 794-95 (Fed. Cir. 1988) (rejecting contractor's argument that violation of government regulations evidenced breach of contract where contractor failed to adduce evidence that government regulation at issue formed an integral part of the contract).

Scott Timber, 40 Fed. Cl. at 505.

This Court believes that the *Scott Timber* Court's reliance on *Smithson* is misplaced when it is used to require that a statute must be incorporated in a contract in order to determine whether the failure to do an act, contrary to a statute, can in a particular instance cause a breach of an implied duty. *Smithson* does not discuss whether the regulations (of the Farmers Home Administration in that case) must be incorporated into the agreement; it assumes that they must be and holds that they were not. *Smithson*, 847 F.2d at 794. Furthermore, *Smithson* noted that it was not called upon to decide whether the act which supposedly violated a statute was unreasonable or wrongful. *Id.* Yet the unreasonableness of the failure to submit LRMPs for consultation with the FWS under section 7 of the ESA is an issue squarely before this Court to decide.

As a final assault on the implied duties, the Defendant tries to play clauses CT 6.25 and CT 6.01 off each other by claiming that CT 6.01 provides the Defendant with a far-reaching authority to suspend contracts pursuant to a court order that trumps the specific representations of CT 6.25. In other words, CT 6.01 provides such wide-ranging suspension authority pursuant to a court order that the Plaintiff cannot rely on any specific representation or warranty contained in CT 6.25 as a gauge of proper exercise of the right to suspend. It argues that any other result would read CT 6.01 out of the contract. This argument, however, is unavailing. The specific warranty contained in CT 6.25 limits the authority of the Forest Service to suspend contracts under CT 6.01. Under the terms of 6.01, the Forest Service may suspend pursuant to a court order "to prevent serious environmental degradation or resource damage that may require contract modification under CT 8.3 or termination pursuant to 8.2." However, the Forest Service may not reduce liability by means of CT 6.01 for suspensions that occurred as a result of the breach of an express warranty in CT 6.25. Thus, to the extent that the disclosures in CT 6.25 serve as a warranty, the Plaintiff was entitled to rely on the more specific representations contained in clauses CT 6.25 that necessary protective measures had been included in the contract and that CT 6.01 applied to matters outside the scope of the representations included in CT 6.25. *T. Brown Constructors, Inc. v. Pena,* 132 F.3d 724, 729 (Fed. Cir. 1997) (*citing Woodcrest Construction Co. v. United States*, 187 Ct. Cl. 249, 408 F.2d 406, 411 (Ct. Cl. 1969)). Such a construction, contra the Defendant's arguments, does not read CT 6.01 out of the contract, but instead gives effect to both the terms of any express warranties contained in CT

6.25 and the reasonable exercise of suspensions contained in CT 6.01.

Thus, because there is no conflict between any express contractual provision and any implied duties, the Court interprets the scope of an express contractual provision in light of an implied duty together in a harmonious and reasonable manner. At the outset, the interpretation of the express term should be construed strongly against the drafter, which is the Forest Service in this case. *D.F.K. Enterprises,* 45 Fed. Cl. at 289. If a contractor's interpretation of the contractual language falls within the zone of reasonableness, the contractor's interpretation prevails. *Interstate Gen. Gov't Contractors, Inc. v. Stone,* 980 F.2d 1433, 1434 (Fed. Cir. 1992). However, even in the face of an unambiguous explicit term of a contract, implied duties remain in the background of the contract as a minimum and fundamental standard of conduct by which contracting parties must abide. 3 *Corbin on Contracts,* § 570(A) (Supp. 2000) ("What courts are doing here [in recognizing implied duties] . . . is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about these expectations.") The purpose of these standards is to protect the reasonable and fundamental expectations of the contracting parties. *Restatement (Second) of Contracts,* § 205 cmt. a ("Good faith performance . . . emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.") One such fundamental expectation, relevant here, is that when the performance of a contract remains in the control of a particular party, i.e., the Government, by means of

an express term, the other party is protected from an unreasonable or arbitrary exercise of such control. *See Scott Timber Co. v. United States,* 40 Fed. Cl. at 502 ("It is a well-established principle of law that a party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily and capriciously") (*quoting Thomas Creek Lumber & Log Co. v. United States,* 32 Fed. Cl. 787, 790 (1995)). This fundamental expectation is analogous to findings that the standard FAR Suspension of Work clause limits the liability of the Government only to the extent that the delay is not unreasonable or where the Government is not the culprit for a delay. *Sergent Mechanical Systems, Inc. v. United States,* 34 Fed. Cl. 505 (1995).

This case is remarkably similar to one heard by the Interior Board of Contract Appeals ("IBCA") which dealt with similar circumstances in which a government agency, by wrongfully delaying the performance of timber contracts by its own fault, breached the implied duty not to hinder. In *Superior Timber Co., Inc.,* IBCA No. 3459.97-1 BCA ¶ 30, 267, the Bureau of Land Management ("BLM") was held to have breached its implied duty not to hinder the contracts when it suspended the plaintiff's contracts. *Id.* at 143, 443. Like the present case at bar, the contracts at issue were suspended in order to comply with an injunction which required the BLM to consult with the FWS on the effects of its timber management sale program on the northern spotted owl. *Id.* at 143, 438. Because the failure of the BLM to consult with the FWS as required by law was unreasonable, the Government was deemed to have breached its implied duty not to hinder the contracts notwithstanding the contractual provision which gave the BLM the

authority to suspend the contracts. *Id.* Although this case is not precedent, the Court finds its reasoning persuasive insofar as it holds that, even in the face of general suspension authority, the Government can be held liable for delays in timber contracts caused by its own unreasonable failure to submit Forest Plans and when such delays were entirely within the control of the Government.

Here, the Forest Service had control over the performance of the contracts by means of CT 6.01 and it was entitled to exercise such control provided that the reasonable expectations of the parties at the time of the contract were maintained. Although CT 6.01 permits the suspension of the 13 non-Hay contracts at issue, it is not reasonable to interpret that clause as to permit the suspension of the contracts when the Government unjustifiably and unreasonably failed to comply with its pre-existing duties that relate directly to the performance of the contracts at issue. Indeed, "an unreasonable delay attributable to the government may breach the obligation not to hinder the performance of the other party." *Cedar Lumber,* 5 Cl. Ct. at 549.

Thus, if the failure of the Forest Service to consult with the FWS was the cause of a wrongful suspension, the suspension would constitute a breach of the implied duty not to hinder notwithstanding the express language of clause CT 6.01.

Similarly, another fundamental expectation of a contractor at the time of the bargain, relevant to this case, is that when the Government discloses certain restrictions placed on the performance of the contract and discloses that further restrictions on performance

may be imposed in the future based on changed circumstances or more complete information, the Government had a reasonable basis for its disclosure. Such a fundamental expectation is analogous to the rule in which the Government's liability for a breach of warranty cannot be limited by clear exculpatory language when the breach arises out of events within the Government's control. *C.J. Betters v. United States,* 25 Cl. Ct. at 677 (1992). In this case, clause CT 6.25 contained in all 14 contracts at issue disclosed such restrictions on the performance of the contracts by stating "measures needed to protect [threatened or endangered species under the ESA in] such areas have been included elsewhere in this contract or are as follows. . . ." Thus, the Plaintiff had a fundamental expectation that the Forest Service had a reasonable basis for disclosing the special protective measures that were contained in clause CT 6.25. *Womack v. United States,* 182 Ct. Cl. 399, 389 F.2d 793 (1968). If the Forest Service did not have a reasonable basis for its disclosure, then the misrepresentations and the subsequent suspension of the contracts to correct the warranties would constitute a breach of the implied duty to cooperate, notwithstanding the suspension authority contained in CT 6.25. Specifically, because the LRMPs constituted "agency action," the Forest Service could not accurately represent that "measures needed to protect [threatened or endangered species under the ESA in] such areas have been included," since it had not consulted with the FWS as it was required to do by statute. This issue is discussed in more detail in the next section.

VI. The Forest Service Breached its Implied Duty to Cooperate by Breaching an Express Warranty Contained in CT 6.25

A. Clause CT 6.25 Contains an Express Warranty

At the outset, it must be established whether CT 6.25 contains an express warranty at all. Then the scope of any such warranty must be determined.

Clause CT 6.25 ostensibly permits the Forest Service to unilaterally cancel or modify the contracts at issue. It also permits the Forest Service to "provide additional protection," i.e., restrictions on the performance of the contracts, if "special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973" listed in the contracts later "prove inadequate." The Plaintiff argues that this clause expressly warranted that the Forest Service had disclosed every needed protective measure that it knew or should have known at the time the contract was entered into and as more information became available. The Defendant, however, denies that clause CT 6.25 provided a warranty for several reasons. First, the plain language of clause CT 6.25 did not expressly warrant that the Forest Service had taken every required action to assure that the representations made were accurate because the words "all" or "the" were not included in the phrase "measures needed to protect such areas have been included elsewhere in this contract or are as follows," and that the contract expressly contemplated that additional measures could be imposed. Second, the clause itself placed the Plaintiff on notice that future restrictions may be placed on timber sales. Thus, the contracts contained no express warranty

that suspensions would not occur in the future. *See Scott Timber,* 44 Fed. Cl. at 181. Third, it argues that its position is reasonable because courts regularly give great deference to the autonomy of parties to set contract terms and that such terms must be enforced. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (contractual waiver of due process rights are enforceable); *Hoskins Lumber Co. v. United States,* 89 F.3d 816 (Fed. Cir. 1996). Finally, the Defendant argues that the position of Region 3 of the Forest Service on consultations was well known and easy for the Plaintiff to ascertain, and that the *Pacific Rivers* decision was certainly public knowledge. Therefore, the Plaintiff could not have relied on clause CT 6.25 as a far-reaching warranty without a reasonable investigation. *Collins v. United States,* 209 Ct. Cl. 413, 420-21, 532 F.2d 1344 (1976).

However, the Defendant's arguments do not avail. The Defendant's argument that lack of the words "all" or "the" in clause CT 6.25 negates any express representation fails because it is hypertechnical and is contrary to the natural reading of the text itself. The clause clearly states that such measures "have been included elsewhere in the contract or are as follows." The most straightforward reading of the clause would suggest to a contractor that the Forest Service had disclosed all protective measures required to comply with the ESA that it knew were necessary or should have known were necessary. Further, a contractor would assume that the Forest Service had a reasonable basis for its disclosures and would not reasonably believe it was assuming the risk that the Government might not have a reasonable basis for its disclosures. *Hollerbach v. United States,* 233 U.S. 165,

34 S.Ct. 553, 58 L.Ed. 898 (1914); *Everett Plywood & Door Corp. v. United States,* 190 Ct. Cl. 80, 419 F.2d 425 (1969); *Womack v. United States,* 182 Ct. Cl. 399, 389 F.2d 793 (1968). Moreover, the Defendant's argument that the Plaintiff had a duty to investigate whether the express warranty clauses had a reasonable basis is flawed. In order to recover on a breach of express warranty claim, the Plaintiff is not required to show that it relied on the warranty. *Hercules, Inc. v. United States,* 516 U.S. 417, 425, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996) ("When the government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications.").

The Defendant's contention that its interpretation of the contract should prevail because courts generally uphold the autonomous rights of parties to contract rings hollow in the face of precedent in which the Government is liable for cases where a contractor cannot perform according to government-drafted specifications because the specifications themselves are defective. *United States v. Spearin,* 248 U.S. 132, 136, 54 Ct. Cl. 187, 39 S.Ct. 59, 63 L.Ed. 166 (1918); *Blount Bros. Corp. v. United States,* 872 F.2d 1003, 1007 (Fed. Cir. 1989). Timber sale contracts are contracts of adhesion. *Seaboard Lumber Co. v. United States,* 41 Fed. Cl. 401, 408 (1998) (*citing Everett Plywood Corp. v. U.S.*, 227 Ct. Cl. 415, 651 F.2d 723, 730 (1981)). Further, exculpatory provisions are also construed "narrowly and strictly." *New Valley Corp. v. United States,* 119 F.3d 1576, 1584 (Fed. Cir. 1997). Because exculpatory clauses are to be narrowly construed, this Court has refrained from enforcing a limitation of liability clause when the circumstances

surrounding the breach are within the Government's control. "The rule in this Circuit is that the efficacy of a limitation of liability clause does not extend to those situations where the breach, whether total or partial, arises out of the events within the Government's control." *C.J. Betters Corp.*, 25 Cl. Ct. at 677 (*quoting Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 127 F. Supp. 187 (1955)). Thus, the government is liable for damages attributable to misstatements of material fact in the contract. *D.F.K. Enterprises v. United States*, 45 Fed. Cl. 280, 287 (1999) ("contract terms susceptible to a misleading reading or implication subject the government to liability when a contractor misled by the term suffers injury.").

Consequently, the Court determines that the natural reading of clause CT 6.25 warrants that, at the time the contracts were entered into, the Forest Service had identified special measures necessary to protect species under the ESA, that it identified these measures based on analysis of reasonably available information, and that, based on the information reasonably available, the special measures disclosed were adequate for the protection of endangered or threatened species.[36] However, the express warranty contained in CT 6.25 is a narrow one. CT 6.25 only warrants the Plaintiff that additional protection would only be imposed if measures proved inadequate due to causes that could not have reasonably been known or

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[36] The Defendant seems to have conceded this point by stating that, "[T]he plain language of the clause indicates that the clause was intended to place the purchaser on notice of any current restrictions on operations on the timber sale area and was not a warranty against the possibility of any future restrictions." (Def.'s Opp'n at 4.)

discovered *at the time the contract was entered into.* If, in this specific circumstance, the contracts are suspended in order to correct a misrepresented warranty, the Forest Service breached a specific warranty.

However, other than the narrow warranty described above, clause CT 6.25 does not generally warrant against the imposition of additional protective measures subsequent to the enactment of the contract, because it expressly contemplates that "[i]f protective measures prove inadequate . . . or if new species are listed on the Endangered Species list," the Forest Service can cancel or modify the contract, or institute new protective measures. In particular the unambiguous clause, " 'regardless of when such facts become known' . . . alludes to continued information gathering by the Forest Service and possible suspension of the sales." *Scott Timber,* 44 Fed. Cl. at 181.[37] The Plaintiff tries to distinguish *Scott Timber*'s holding by claiming that it must be seen in the light of special legislation that affected Scott Timber's contracts,[38] but which is irrelevant to the present case. However, its argument is not persuasive because *Scott Timber*'s holding also rests on an analysis of the

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[37] Clauses C6.25 and C6.01 in *Scott Timber* are almost identical to that of clauses CT 6.25 and CT 6.01 at issue in this case. The slight differences between the clauses are immaterial to any issue in either case. *See Scott Timber,* 40 Fed. Cl. at 500, 502.

[38] ". . . the Forest Service identified no areas needing special protective measures in the contracts because Congress directed through Section 318 that no special measures were required." *Scott Timber,* 44 Fed. Cl. at 180 (1999).

language of clause CT 6.25 apart from any legislation.[39]

B. Whether the Forest Service Breached its Express Warranty

The Plaintiff argues that the Forest Service violated its representation in CT 6.25 that it had identified special measures necessary to protect the Mexican spotted owl under the ESA, that it identified these measures based on analysis of reasonably available information, and that, based on the information reasonably available, the protective measures were adequate. These warranties are alleged to be untrue because the Forest Service had failed to meet its pre-existing obligations under section 7 of the ESA to consult with the FWS on the Mexican spotted owl, and therefore, it had no reasonable basis of knowing whether the special measures contained in clause CT 6.25 were adequate. However, as stated earlier, the Forest Service could, in accordance with the terms of CT 6.25, impose additional protective measures, including suspensions, in response to information that was not known or could not reasonably be ascertained. Therefore, it must first be determined whether the Forest Service had a reasonable basis for its position on consultations.

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[39] Notwithstanding any warranty, an unreasonable suspension caused by the fault of the Government pursuant to CT 6.25 breaches the implied duty not to hinder the contracts at issue, as will be discussed below. *See infra*, § VII.

1. The Forest Service Had a Reasonable Basis for Failing to Consult with the FWS at the Time of the Listing of the Mexican Spotted Owl.

The Plaintiff argues that it was unreasonable for the Forest Service not to have submitted its existing LRMPs for consultation with the FWS when the Mexican spotted owl was listed as a threatened species on April 15, 1993, because on March 4, 1992, the Ninth Circuit had ruled in *Lane County* that programmatic management plans used to implement timber sales were "agency action" and, as such, a government agency was required to consult under section 7 of the ESA whenever a new species was listed that could be affected by activities conducted pursuant to the timber management plans. *Lane County,* 958 F.2d. at 293. In the wake of *Lane County* and the listing of the Mexican spotted owl, the Forest Service could have changed its position on submitting LRMPs for consultation with the FWS, but it did not. Instead, after *Lane County* was decided, the Forest Service attempted to avoid submitting its LRMPs by jerry-rigging a regulatory mechanism of (ultimately inadequate) conservation measures in Region 3 consisting of a series of nonbinding interim directives and environmental impact statements that it hoped would stave off listing of the Mexican spotted owl by the FWS. Once the Mexican spotted owl was listed, the Forest Service elected only to submit "iterations" of projects to the FWS for consultation (which the FWS itself maintained was not a "true" programmatic

consultation on a region- or forest-wide basis),[40] rather than submitting the existing LRMPs themselves. The Plaintiff argues that, once the FWS listed the Mexican spotted owl as a threatened species, the Forest Service was obligated to submit its existing LRMPs plans for consultation.

However, at the time of the listing of the Mexican spotted owl, the Forest Service did in fact have a reasonable basis for believing that it did not need to submit its existing Region 3 LRMPs to the FWS for consultation. At issue in *Lane County* was a timber management plan that was enacted after the listing of a threatened species (the northern spotted owl). *Lane County,* 958 F.2d at 291. However, in Region 3, the LRMPs were completed between 1985 and 1988, several years before the Mexican spotted owl was listed. This left open the legal question of whether only amendments and revisions to existing LRMPs qualified as "agency action" within the meaning of the ESA, or whether pre-existing LRMPs also qualified as "agency action." However imprudent or risky its strategy of avoiding consultations on its existing LRMPs was, the Forest Service had a genuine legal argument that it did not have to submit these Forest Plans for consultation. It was not patently unreasonable, at the time of the listing of the Mexican spotted owl, for the Forest Service to have failed to submit its pre-existing LRMPs for consultation with the FWS.

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[40] The original LRMPs, it should be recalled, contained a biological assessment which stated that, if a new species were listed, consultations on the LRMPs should be initiated.

2. The Forest Service Did Not Have a Reasonable Basis for Failing to Consult with the FWS after the *Pacific Rivers* Decision.

After the Oregon district court issued its ruling in *Pacific Rivers*, but before the decision was affirmed by the Ninth Circuit, the Forest Service had received a Notice of Intent to Sue from the environmental organization Earthlaw, on the grounds that its failure to submit pre-existing LRMPs for consultation with the FWS was in violation of section 7 of the ESA. In response, Regions 1 and 4 of the Forest Service submitted their LRMPs to the FWS for consultations, but Region 3 did not. Instead, the Forest Service, over the stated objections of the FWS, submitted "iterations" or groups of projects for consultations.

On July 7, 1994, the Ninth Circuit, in *Pacific Rivers,* held that LRMPs implemented prior to the listing of an endangered or threatened species were "agency action" for the purposes of the ESA, and therefore were required to be submitted for consultation with the FWS. *Pacific Rivers,* 30 F.3d at 1051-52. In the face of this clear ruling, a notice of an impending lawsuit which sought to force the Forest Service to submit its LRMPs in Region 3, and the actual submission of LRMPs by other regions of the Forest Service, Region 3 should have taken two actions. First, it should have submitted its pre-existing LRMPs for consultations with the FWS pursuant to 16 U.S.C. § 1536(a)(2). Second, to prevent "any irreversible and irretrievable commitment of resources," the Forest Service should have suspended all logging activities within Region 3 during the course of consultations as required by 16 U.S.C. § 1536(d). However, the Forest Service did not take these actions.

Instead, Region 3 tried to avoid the clear mandate of *Pacific Rivers* by submitting *amendments* to the LRMPs for consultation with the FWS. When the plaintiffs in *Silver v. Thomas* filed their complaint on August 8, 1994, demanding that Region 3 submit its LRMPs to the FWS for consultations, Region 3 still refused to comply with *Pacific Rivers* even though the Department of Justice itself maintained that *Pacific Rivers* was directly applicable to the *Silver v. Thomas* case and "strongly urge[d]" the Forest Service to submit plans for consultation and settle *Silver v. Thomas.*[41] Instead, the Forest Service recommended that the Department of Agriculture seek a reversal of *Pacific Rivers* in the U.S. Supreme Court and seek a stay of the *Pacific Rivers* ruling. However, at no time

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[41] At oral argument, the Defendant claimed that legal advice provided to the Forest Service by Department of Justice attorneys was subject to the attorney-client privilege. (Tr. at 42-43.) This document, however, was included in the appendix of the Plaintiff's cross-motion for summary judgment. (Pl.'s Cross-Mot at App. 390). Moreover, the Plaintiff's counsel represented that it obtained this document from the Defendant in the course of discovery. (Tr. 43-44.) This document, in normal circumstances, would be covered by the attorney-client privilege. As a general rule in this Circuit, an inadvertent disclosure of a privileged document waives the privilege. *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990). However, if a party proves that it did not intend to disclose the privileged documents and that, despite the disclosure, it took reasonable steps under the circumstances to prevent the disclosure, the privilege is not waived. *National Helium Corp. v. United States*, 219 Ct. Cl. 612, 616 (1979). The Defendant has not offered any evidence that the document was inadvertently provided nor has it attempted to show that it took reasonable steps to prevent the disclosure. Because the Defendant has not attempted to satisfy the *National Helium* test, and its eleventh-hour objections are, in any event, untimely, the attorney-client privilege is deemed waived.

did the Government ever seek an injunction or stay of *Pacific Rivers* in the Ninth Circuit. Instead the Forest Service, in the face of clear controlling precedent to the contrary, still refused to consult with the FWS on the existing LRMPs even though *Pacific Rivers* was binding authority on Region 3.

Instead of settling the *Silver v. Thomas* case and submitting its LRMPs for consultation, Region 3 of the Forest Service continued its vain strategy of avoiding the holding of *Pacific Rivers* by preparing amendments to LRMPs and submitting only the amendments for consultation with the FWS. This strategy, predictably, was rejected by the Arizona district court, and the Forest Service was ordered to submit its LRMPs to the FWS and to suspend all timber contracts relating to the Region 3 LRMPs until the consultation commenced. Thus, the timber sales at issue were suspended the next day, and formal commencement of consultations did not occur until November 9, 1995.

The evidence shows that the Forest Service's failure to engage in formal consultations with the FWS in Region 3, from the Ninth Circuit's decision in *Pacific Rivers* onwards, was unreasonable. The Defendant claims that the Forest Service's failure to initiate consultation on its LRMPs in Region 3 was excusable because "[t]he issue of whether the ESA applied to LRMPs was so complex that the Department of Justice petitioned the United States Supreme Court to resolve the issue." (Def.'s Opp'n at 21.) However, as demonstrated above, there was nothing complex about the issue itself. Nor does the filing of a petition for a writ of certiorari evidence reasonableness on the part of the Forest Service in the absence of a stay of the *Pacific Rivers* decision. It is implausible in this

instance to say the Forest Service reasonably, but mistakenly, believed that it was entitled not to initiate consultations with the FWS upon the listing of the Mexican spotted owl, because the Chief of the Forest Service noted, in a letter to Senator Kempthorne, dated October 11, 1994, that *Pacific Rivers* was "likely applicable" beyond the facts of the decided case and referenced *Silver v. Thomas* as an illustrative example.

Thus, the Forest Service breached, with respect to those contracts entered into after the Ninth Circuit's decision in *Pacific Rivers* on July 7, 1994,[42] an express warranty contained within CT 6.25. Specifically, the Forest Service breached an express warranty that clause CT 6.25 of these contracts disclosed the protective measures which were necessary to comply with the ESA by including misrepresentations in the warranty and suspending those contracts in order to correct the misrepresentation. The misrepresentation contained in the warranty was that the Forest Service had no reasonable basis to know whether its warranty was true, due to its unreasonable failure to submit its Region 3 LRMPs for consultation with the FWS and its unreasonable failure to suspend logging activities within Region 3 when the Forest Service knew it was required to do so after the Ninth Circuit decision in *Pacific Rivers*. Therefore, because the Forest Service breached an express warranty contained in those contracts, the Forest Service also breached its implied duty to cooperate with respect to those contracts

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[42] The following contracts were entered into after July 7, 1994: Mud, Monument, Saginaw-Kennedy, Brann, Manaco, Brookbank, and Kettle.

entered into after July 7, 1994, the date of the Ninth Circuit's decision in *Pacific Rivers*.

VII. The Forest Service Breached Its Implied Duty Not to Hinder 11 of the Contracts at Issue When It Suspended the Contracts at Issue

A. The Forest Service Suspended the Contracts at Issue by Its Own Fault

As stated above, the Government may be held liable for a breach of an implied duty not to hinder the performance of a contract if the hindrance is caused by the fault of the Government. *Chalender v. United States,* 127 Ct. Cl. 557, 563, 119 F. Supp. 186 (1954); *James Stewart & Co.,* 105 Ct. Cl. at 328, 63 F. Supp. 653. This Court also determined that if the Forest Service unreasonably failed to submit its LRMPs with the FWS on a timely basis, then the 14 contracts at issue were breached, notwithstanding the purported right to suspend the contracts under clauses CT 6.01 and CT 6.25. Because the Court has already determined that the failure of the Forest Service to submit its LRMPs upon the Ninth Circuit's decision in *Pacific Rivers* until ordered to do so by the Arizona district court was unreasonable,[43] it holds that the Government is culpable for the suspension of the 14 contracts. However, in order to hold that the Forest Service breached the implied duty not to hinder, the Court must determine whether, in the surrounding circumstances of the contract, the length of the suspension was unreasonable.

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[43] *See supra,* § VII(B)(2).

B. The Length of the Suspension of 11 of the 14 Contracts Was Unreasonable

Under the regulations implementing the ESA, formal consultations are to last no more that 90 days. 50 C.F.R. § 402.14(c) (2000). The Biological Opinion is to be issued by the FWS within 45 days. 50 C.F.R. § 402.14(e) (2000). Thus, had the suspensions been conducted according to the regulations, the suspension should have not lasted much more than 135 days. In fact, the suspensions lasted from August 25, 1995, until December 4, 1996, for a total of *467 days*. Notwithstanding the protracted length of the suspensions, the mere fact that the suspensions remained in effect far longer than provided for in the regulations does not in itself suggest that the length of the delay was unreasonable and was the fault of the Forest Service.

However, the Court finds that the length of the suspensions was unreasonable for 11 of the 14 contracts at issue and the Forest Service was at fault for the delay. First, on August 25, 1995, the Forest Service requested that the FWS engage in informal consultations on the existing LRMPs rather than engaging in formal consultations right away. The purpose of the informal consultation was purportedly to allow the Forest Service to gather information necessary for formal consultations. In fact, the Forest Service did not request formal consultations until September 6, 1995, and did not formally reinitiate consultations until November 9, 1995, due to the failure of the Forest Service to provide the FWS with all necessary information. While the delay is in itself inexplicable, it is particularly egregious because the Forest Service reasonably could have gathered the

necessary information for consultation at any time between the Ninth Circuit's decision in *Pacific Rivers* and the district court's order in *Silver v. Thomas*. The 2-month delay between the district court's order and the initiation of formal consultations was unreasonable.

Second, the Forest Service further unreasonably delayed the completion of the consultation process by its failure to provide the environmental plaintiffs and the district court with a legally sufficient Biological Opinion in conformity with the joint stipulation of dismissal of the case on several occasions. On April 2, 1996, the Forest Service forwarded a draft Biological Opinion to the environmental plaintiffs, who in turn sought and obtained a ruling from the district court that the Biological Opinions did not meet the legal requirements of the ESA and that the Forest Service was not "carry[ing] out its duties set forth in the law, orders of this Court and stipulation of the parties . . . ." (Pl.'s Cross-Mot. at App. 539.) On July 12, 1996, the FWS issued a final Biological Opinion, which the Forest Service submitted to the district court unilaterally declaring that consultations and suspensions were at an end in blatant contradiction to the orders of the district court. As a consequence of the Forest Service's failure to abide by its orders, the district court noted that the Forest Service, "[r]ather than speeding up the resolution of this lawsuit," was causing instead its being "delayed by inappropriate procedures." (Pl.'s Cross-Mot. at App. 567.) On September 17, 1996, the district court ruled that the Biological Opinions were still legally deficient. It was not until November 26, 1996, that the Forest Service provided a set of final Biological Opinions which were accepted by the Court on December 4, 1996. These

series of substantive and procedural blunders by the Forest Service exacerbated the already unreasonable delays in the completion of the consultations and the lifting of the suspensions on the contracts at issue.

Third, the Arizona district court, which was in the position to weigh the Forest Service's compliance with the stipulation of dismissal, opined that the Forest Service was not diligent in doing all that it could to lift the suspensions. "The Court is deeply concerned about the impact of this situation, but finds that the USFS is the culprit before the timber industry for the delays, not the Court." (Pl.'s Cross-Mot. at App. 581.) "[T]hird parties are being injured while the litigants really have not much at stake on way or the other and don't seem to much-and don't seem to be working as diligently as they should to bring a resolution to it." (Pl.'s Cross-Mot. at App. 595.) The district court was in the position of weighing whether the Forest Service was the cause of unreasonable delays in bringing the consultations to a timely conclusion. The Arizona district court repeatedly concluded that the Forest Service unreasonably delayed the completion of consultations. This Court agrees with the conclusions of the district court.

However, the Court does not find that the length of the suspensions for the Brann, Hutch-Boondock, and St. Joe timber sale contracts were unreasonable. According to the order approving the joint stipulation between the environmental plaintiffs and the Forest Service in *Silver v. Thomas*, performance of timber sale contracts could proceed for those three contracts. (Pl's Cross-Mot. at 489.) The two-month suspension of these contracts, in light of the regulations which

normally would prescribe consultations to be completed within 135 days, is reasonable.

Therefore, the Court finds that the length of the suspension was both unreasonable and the fault of the Forest Service with respect to all contracts at issue with the exception of the Brann, Hutch-Boondock, and St. Joe contracts.

C. The Plaintiff's Operations Were Significantly Hindered by the Delays

The Court finds that the Defendant was aware that the Plaintiff's operations would be significantly hindered by the delay. The Forest Service was aware of the effects of the suspension of the timber sales contracts on the timber industry as a whole within Region 3. It noted in a document prepared on August 28, 1995, days after the suspensions were announced, that the months of September through November were the peak logging months in Region 3 due to weather conditions during the winter and logging restrictions through most of the forests the rest of the year. Further, the Forest Service knew that if the suspension remained in place for those peak months, that many timber mills would have to be shut down temporarily or permanently. Thus, because the suspensions lasted from August 1995 through December 1996, the Forest Service knew that the timber industry as a whole was deprived of 2 years' worth of timber sales. The Forest Service also received correspondence from the Plaintiff that it was suffering from economic harm from the ongoing suspensions, including mill shutdowns.

To recap, the Court finds that, in light of the circumstances surrounding the contracts, the initial suspensions of 11 the 14 contracts were wrongfully caused by the Forest Service, and that the length of the suspensions was both unreasonable and wrongfully caused by the Forest Service, and that the Plaintiff's operations were significantly hindered. Therefore, the Court finds that the Forest Service breached its implied duty not to hinder the performance of all contracts at issue with the exception of the Brann, Hutch-Boondock, and St. Joe contracts.

VIII. The Suspensions of the Contracts Were Not Sovereign Acts

The Defendant argues that the suspensions of the contracts by the Forest Service in order to comply with the Arizona district court's order and section 7 of the ESA were sovereign acts which shield it from liability for any breach of the contracts at issue. The sovereign acts defense is an element of every Government contract, whether explicitly stated or not. *Walter Dawgie Ski Corp.*, 30 Fed. Cl. at 131 (1993), (*citing Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993)). The sovereign acts defense "excuses the government from performing a contractual obligation if performance is rendered impossible by a public and general sovereign act." *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514, 533 (2000).

In order for the Government to be shielded from liability under the sovereign acts defense, the act must be attributable to the government as sovereign rather than the government as contractor; or, in other words, a "public and general" act. *United States v. Winstar*

Corp., 518 U.S. 839, 895-96, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (plurality). *See also Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 69 L.Ed. 736 (1925). An act of government will be considered to be sovereign so long as the act's impact on the contracts at issue is "merely incidental to the accomplishment of a broader government objective." *Winstar*, 518 U.S. at 898, 116 S.Ct. 2432. However, an act of government will not be held to be "public and general if it has the substantial effect of releasing the Government from its contractual obligations. . . ." *Id.* at 899, 116 S.Ct. 2432.

However, even if a court determines that a breach was a sovereign act, the Government will not have the benefit of the sovereign acts defense if it cannot satisfy the common-law doctrine of impossibility. *Id.* at 904, 116 S.Ct. 2432. ("the Government . . . must show that the [act] rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and must ultimately show that the language or circumstances do not indicate that the Government should be liable in any case") *See also Croman v. United States*, 49 Fed. Cl. 776, at 781-83 (2001.)

The suspensions of the contracts were public and general acts because the Forest Service is mandated under section 7(a)(2) of the ESA to consult with the FWS "to insure that any action authorized . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). Section 7(d) of the ESA mandates that the Forest Service may not make any "irreversible or irretrievable commitment of resources" during consultations. 16 U.S.C. § 1536(d). The Arizona district

court specifically directed the Forest Service in *Silver v. Thomas* to comply with the ESA by suspending all timber harvesting activities until it consulted with the FWS on the existing LRMPs as required by section 7(a)(2), and by suspending all timber harvesting activities during consultations as required by section 7(d). (Def.'s Mot. at App. 31-32.) Thus, there can be no doubt that the Forest Service's suspensions were taken to comply with its statutory duties (and a court order), and therefore that the acts were "public and general" acts. *See Croman Corp. v. United States*, 44 Fed. Cl. 796, 806-07 (1999), *withdrawn in part*, 49 Fed. Cl. 776, at 782-83 (2001.)[44]

Although the suspensions of the contracts were sovereign acts, the Defendant cannot avail itself of the sovereign acts defense because it cannot satisfy the common-law doctrine of impossibility; namely, that it cannot show that the non-occurrence of the

---

[44] The *Croman* court initially held that the suspension of a timber sales contract satisfied the sovereign acts defense because the suspension of the contract, for the purpose of implementing the requirements of the ESA with respect to the listing of the marbled murrelet as a threatened species, was a public and general act. *Croman Corp.*, 44 Fed. Cl. at 807. On reconsideration, the *Croman* court did not change its finding that the suspension of the timber sales contract at issue was a public and general act. *Croman Corp.*, 49 Fed. Cl. 776, at 783-84 (2001). However, it withdrew its finding that the suspension satisfied the sovereign acts defense on the ground that, following *Scott Timber* and the plurality Supreme Court opinion in *Winstar*, the common law test of impossibility could not be applied to suspension of the contract because suspensions were explicitly contemplated by the parties and allocated in the contract. *Croman*, 49 Fed. Cl. 776, at 781-82 (2001). Croman's updated analysis of the sovereign acts defense is more or less identical to the analysis which this Court adopts.

suspensions of the contracts were a basic assumption of the parties. *See Scott Timber*, 40 Fed. Cl. at 508. Clause CT 6.01 contemplated that the contracts could be suspended pursuant to a court order, or to "prevent serious environmental degradation." Clause CT 6.25 contemplated that the contracts at issue might be cancelled, modified, or that additional protective measures might be imposed on the contractor in order to comply with the ESA. The Defendant's argument that *Scott Timber* can be distinguished because the Plaintiff here is seeking, in effect, to remove CT 6.01 and CT 6.25 from the contracts at issue is clearly wrong because the Court has not read CT 6.01 and CT 6.25 out of the contract, but instead interprets theses clauses in light of the implied duties to cooperate and not to hinder the contracts. *See* § 5(b), *supra*.

Finally, the Defendant disapprovingly notes that at the same time that the Plaintiff maintains that protective measures and court orders were contemplated by the parties, the Plaintiff "attempts to portray itself as an unsophisticated timber purchaser with no knowledge of any upcoming environmental events and solely dependent upon Government's representations." (Def.'s Reply at 30.) The Defendant's point is well taken. Certainly, the possibility that the Mexican spotted owl might be declared a threatened species would have been no mystery to the Plaintiff. The Plaintiff should have been aware that a petition to list the Mexican spotted owl as a threatened or endangered species was filed with the FWS in 1989, and the FWS issued its proposed rule listing the Mexican spotted owl as a threatened species in 1991. The Plaintiff also should have been aware of the Forest Service's management guidelines to provide protection of the Mexican spotted owl as published in the *Federal*

Register and should have been aware of the position of the FWS that the conservation strategy of the Forest Service was inadequate. It is unclear from the record to what extent the Plaintiff was or should have been aware of the Forest Service's position on consultations as represented in some of internal memoranda submitted with this motion. These considerations lead the Court to question whether the Forest Service's failure to timely consult with the FWS was a "*felix culpa*" for the Plaintiff, who up until the suspensions were imposed may have, knowingly or not, benefitted, in the short term, from the Forest Service's risky strategy to avoid suspensions in timber sales by avoiding consultations on LRMPs.

This question, however, is not now before the Court, nor need it be answered to enter judgment as to liability. However, consideration of this issue may well be desirable when it comes time for the Court to determine an appropriate measure of damages in this case.

IX. Conclusion

The Court finds that the Forest Service breached its implied duty to cooperate with respect to the following contracts: Mud, Monument, Saginaw-Kennedy, Brann, Manaco, Brookbank, and Kettle. The Court also finds that the Forest Service breached its implied duty not to hinder with respect to the following contracts: Hay, O.D. Ridge, U-Bar, Jersey Horse, Salt, Mud, Monument, Saginaw-Kennedy, Manaco, Brookbank, and Kettle. Therefore, the Court GRANTS, in part, the Plaintiff's cross-motion for summary judgment as to liability and DENIES the Defendant's motion to dismiss or, in the alternative,

for summary judgment. The Court ORDERS that a joint status report be submitted within 10 days of the entry of this opinion on further proceedings in this case and in the complaint recently filed by the Plaintiff on July 17, 2001, with respect to the Forest Service's suspensions in 1997 of 6 of the contracts at issue in this case. The joint status report shall contain 3 mutually agreeable days for a status conference no earlier than August 15, 2001.

IT IS SO ORDERED.

APPENDIX C

NOTE: This order is nonprecedential

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 2008-5092, -5093

[Filed June 10, 2010]

PRECISION PINE & TIMBER, INC., Plaintiff-Cross Appellant,	)
v.	)
UNITED STATES, Defendant-Appellant.	)

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellant,* and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and

* The court granted Federal Timber Purchasers Committee et al. leave to file a brief amici curiae in support of the combined petition.

thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 17, 2010.

FOR THE COURT,

/s/Jan Horbaly [SB]
Jan Horbaly
Clerk

Dated: 06/10/2010

cc: David A. Harrington
Alan I. Saltman
Richard David Siegel

PRECISION PINE & TIMBER V US, 2008-5092, -5093
(CFC -98-CV-720)

APPENDIX D

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

16 U.S.C. § 1536. Interagency cooperation

(a) Federal agency actions and consultations

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which

is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * *

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

* * *

16 U.S.C. § 1604. National Forest System land and resource management plans

* * *

(f) Required provisions

Plans developed in accordance with this section shall--

* * *

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in

accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

* * *

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

* * *

50 C.F.R. § 402.14 Formal consultation. (1995)

* * *

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved,

the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

* * *

APPENDIX E

C6.01 - INTERRUPTION OR DELAY OF OPERATIONS. (6/90) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

(a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;

(b) To comply with a court order, issued by a court of competent jurisdiction; or

(c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (b).

Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to B8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to B8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or

other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

CT6.01 - INTERRUPTION OR DELAY OF OPERATIONS. (6/90) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

(a) To prevent serious environmental degradation or resource damage that may require contract modification under CT8.3 or termination pursuant to CT8.2;

(b) To comply with a court order, issued by a court of competent jurisdiction; or

(c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (b).

Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to BT8.21. or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season, Contract Term Adjustment pursuant to BT8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

R3-C6.25#
(7/86)

C6.25# - Protection of Endangered Species (7/86). Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or are as follows:

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under C8.2 or unilaterally modify this contract to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

In the event of contract modification under this Subsection, Purchaser shall be reimbursed for any additional protection required by the modification, provided that any work or extra protection required shall be subject to prior approval by the Forest Service. Amount of reimbursement shall be determined by Forest Service using standard Forest Service rate redetermination methods in effect at time of agreed change and shall be in the form of a reduction in Current Contract Rates unless agreed otherwise in writing. However, in no event may Current Contract Rates be reduced below Base Rates.

R3-CT6.25#
(7/86)

CT6.25# - Protection of Habitat of Endangered Species. (7/86) Location of areas needing special measures for protection of plants or animals listed as threatened or endangered under the Endangered Species Act of 1973 and R-3 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract or are as follows:

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under CT8.2 or unilaterally modify this contract or provide additional protection regardless of when such facts become know. Discovery of such areas by either party shall be promptly reported to the other party.

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

JAN HORBALY
CLERK

TELEPHONE: 202-275-8000
FAX: 202-275-9678

April 19, 2010

David A. Harrington, Esq.
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W., Room 12056
Washington, DC 20530

RE: PRECISION PINE & TIMBER V US;
Appeal No. 2008-5092

Dear Mr. Harrington:

This will confirm our telephone call that the court has requested a response from the Appellant to the Cross-Appellant's petition for rehearing and for rehearing en banc.

Please file your response in accordance with Fed. Cir. Rules 35 and 40 on or before May 3, 2010.

Very truly yours,

/s/James Benjamin
James Benjamin
Senior Deputy Clerk

cc: Alan I. Saltman, Esq.

APPENDIX G

United States Court of Appeals for the Federal Circuit

No. 2008-5092, -5093

[Filed February 19, 2010]

PRECISION PINE & TIMBER, INC.,
Plaintiff-Cross Appellant,

v.

UNITED STATES,
Defendant-Appellant.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

CASE NO. 98-CV-720

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

ENTERED BY ORDER OF THE COURT

/s/Jan Horbaly [sg]
Jan Horbaly, Clerk

DATED FEB 19 2010

ISSUED AS A MANDATE: JUN 17 2010

CERTIFIED COPY
I HEREBY CERTIFY THIS DOCUMENT
IS A TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
By: /s/_____ Date: 6/17/10

DEC 13

No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals erred in concluding that the government did not breach petitioner's timber-sale contracts.

2. Whether the court of appeals abused its discretion in directing the entry of judgment for the United States with respect to contracts where no breach was established.

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In the Supreme Court of the United States

No. 10-341

PRECISION PINE & TIMBER, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 596 F.3d 817. The opinion of the Court of Federal Claims (Pet. App. 36a-135a) is reported at 50 Fed. Cl. 35.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2010. A petition for rehearing was denied on June 10, 2010 (Pet. App. 136a-137a). The petition for a writ of certiorari was filed on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1991 and 1995, the United States Forest Service awarded petitioner fourteen contracts to cut and remove timber from national forests. Pet. App. 5a. With one exception—the Hay timber-sale contract—each of the contracts contained a clause, known as CT 6.01, under which petitioner agreed to suspend operations, upon written request of the Forest Service, in order to comply with a court order. *Id.* at 5a, 19a-20a. Those contracts provided that, in the event of such a suspension, petitioner's "sole and exclusive remedy" would be an adjustment of the contract term and recovery of out-of-pocket costs. *Id.* at 20a.

In April 1993, the Mexican spotted owl was listed as a threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Pet. App. 5a. Several environmental groups subsequently filed suit to enjoin timber harvesting in Arizona and New Mexico. *Id.* at 7a. They alleged that timber harvesting under existing Forest Service Land and Resource Management Plans (LRMPs), which had not been re-submitted for consultation with the Fish and Wildlife Service (FWS) after the listing of the Mexican spotted owl, violated the ESA. *Silver* v. *Babbit*, 924 F. Supp. 976, 992 (D. Ariz. 1995). The Forest Service maintained that the statute required no further consultation about existing LRMPs because those LRMPs had already been the subject of formal consultation, albeit before the listing of the Mexican spotted owl. Pet. App. 6a-7a. On August 25, 1995, the district court in the ESA suit ruled in favor of the plaintiffs, enjoined timber harvesting in Arizona and New Mexico, and ordered the Forest Service to commence consultation on existing LRMPs. *Id.* at 8a.

The Forest Service directed petitioner to suspend timber harvesting in order to comply with the court's order, and within two weeks, it requested that the FWS begin consultation about the effect of existing LRMPs on the Mexican spotted owl. Pet. App. 9a, 63a. In October 1995, as the result of a stipulation between the United States and the environmental plaintiffs, petitioner was allowed to restart harvesting on three of its contracts. *Id.* at 65a-66a. On December 4, 1996, the district court in the ESA suit concluded that consultations were complete and dissolved the injunction. *Id.* at 9a, 76a. The Forest Service immediately lifted the suspension of the remainder of petitioner's contracts. *Id.* at 76a-77a.

2. Petitioner submitted claims under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, for contract-term adjustments and damages of approximately $13 million. Pet. App. 9a, 77a. Forest Service contracting officers granted the requested term adjustments and awarded $18,242 in out-of-pocket costs. *Id.* at 9a. The contracting officers denied the balance of petitioner's claims for lost profits and consequential damages. *Ibid*

Petitioner then filed suit in the Court of Federal Claims (CFC). Pet. App. 9a. Petitioner alleged that the suspension of its contracts breached an express warranty and the implied duty of good faith and fair dealing. *Id.* at 9a-10a. On cross-motions for summary judgment, the CFC found two breaches: (1) a breach of warranty with respect to seven contracts, and (2) a breach of the duty of good faith and fair dealing with respect to 11 contracts. *Id.* at 10a. After a trial on damages, the court entered judgment for petitioner in the amount of $3,343,712. *Id.* at 11a.

3. The court of appeals reversed. Pet. App. 1a-35a. The government conceded that it had breached the Hay

timber-sale contract, which did not contain clause CT 6.01. *Id.* at 4a. With respect to the other thirteen contracts, however, the court of appeals held that petitioner's contracts contained no express warranty that the Forest Service had complied with the ESA. *Id.* at 19a. It further held that clause CT 6.01 authorized the suspension of timber harvesting in order to comply with a court order, and that the suspension therefore was not a breach of contract. *Id.* at 19a-21a. The court also determined that the Forest Service had not breached its duty of good faith and fair dealing "because uninterrupted contract performance following an ESA listing decision was not a 'benefit' guaranteed by the contracts." *Id.* at 25a. The court remanded with instructions for the CFC to enter judgment in favor of the United States with respect to those contracts that were not breached, and to "award damages * * * consistent with this opinion" with respect to the Hay contract. *Id.* at 34a-35a.

ARGUMENT

Petitioner contends (Pet. 10-35) that the Forest Service violated the terms of its contracts and breached the implied duty of good faith and fair dealing. The court of appeals correctly rejected those claims, and its fact-bound conclusions about the proper interpretation of the particular contracts at issue does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 10-19) that the court of appeals erroneously created a government contract defense adapted from the sovereign-acts doctrine. That is incorrect. Under the sovereign-acts doctrine, "[w]hatever acts the government may do, be they legislative or

executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *United States* v. *Winstar Corp.*, 518 U.S. 839, 891 (1996) (plurality opinion) (quoting *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925)). The sovereign-acts doctrine has no relevance here because the court of appeals in this case did not address it, much less establish a new defense based upon it.

Petitioner points out (Pet. 12-13) that the court of appeals cited two decisions—*Centex Corporation* v. *United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide Bank* v. *United States*, 431 F.3d 1342 (Fed. Cir. 2005)—that rejected a sovereign-acts defense. But the court cited those cases merely as "examples" of circumstances in which the government engaged in a "bait-and-switch" that violated its duty of good faith and fair dealing. Pet. App. 22a-23a. Although *Centex* and *First Nationwide Bank* also happened to address the sovereign-acts doctrine, the court did not rely on them for any proposition relating to that doctrine, which was not invoked by the government. Petitioner's arguments about the sovereign-acts doctrine therefore provide no basis for this Court's review.

2. Petitioner next argues (Pet. 20-24) that the court of appeals failed to apply its own decision in *Scott Timber Co.* v. *United States*, 333 F.3d 1358 (Fed. Cir. 2003). Any inconsistency between decisions of the Federal Circuit would not be a basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, the decision below does not conflict with *Scott Timber*. See Pet. App. 17a ("Our conclusion is consistent with this court's decision in *Scott Timber Co.* v. *United States*, which similarly concerned the govern-

ment's obligations arising out of timber contracts between the Forest Service and a private party."); see also *id.* at 21a. In both *Scott Timber* and the decision below, the court of appeals held that contract clause CT 6.01 authorized the Forest Service to "unilaterally suspend" timber harvesting to comply with a court order. *Ibid.* (quoting *Scott Timber*, 333 F.3d at 1366). That is precisely what happened here.

Petitioner points (Pet. 22) to the *Scott Timber* court's statement that a suspension must be "reasonable" in duration. The decision below is consistent with that principle. The Forest Service suspended petitioner's timber contracts on August 25, 1995, in order to comply with the district court's injunction. Pet. App. 8a, 63a. When the injunction was dissolved on December 4, 1996, the Forest Service immediately lifted the suspensions. *Id.* at 9a, 76a-77a. At all times, the suspensions were necessary to comply with the district court's order and, therefore, were contractually authorized. *Id.* at 21a; *Scott Timber*, 333 F.3d at 1366.

Petitioner also contends (Pet. 26) that the court of appeals committed "a vast departure from accepted common law standards" governing the implied duty of good faith and fair dealing. That argument lacks merit. A precise definition of good faith and fair dealing has proved elusive, see, *e.g.*, *Market St. Assocs. L.P.* v. *Frey*, 941 F.2d 588, 593 (7th Cir. 1991) (Posner, J.) (noting that "cases are cryptic as to its meaning though emphatic about its existence"), and the requirements of good faith and fair dealing depend on context, see *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1032 (8th Cir. 2010). In this case, the court of appeals accepted petitioner's factual allegations, Pet. App. 21a-22a, evaluated those allegations in light of the terms and context of the

parties' contracts, and concluded that petitioner had failed to establish a breach of the duty of good faith and fair dealing. It noted that the "benefit Precision Pine bargained for was the right to harvest timber in a certain place, at a certain time," but that "the contracts expressly qualified that benefit." *Id.* at 25a. In particular, the "contracts did not promise or guarantee uninterrupted performance following a listing decision," and in fact they "expressly contemplate and allow the Forest Service to interfere with Precision Pine's performance." *Id.* at 26a. Emphasizing that "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions," the court noted that "one 'benefit' the parties did not contemplate, and which [petitioner] is thus not entitled to under the contracts, is the guarantee of uninterrupted performance." *Ibid.* Petitioner identifies no case that suggests that the court's decision conflicts with the "accepted common law standards" of good faith and fair dealing that apply in any other circuit.

3. Petitioner further argues (Pet. 32-35) that the court of appeals should have remanded the case to the CFC to allow that court to determine whether the government had breached the implied duty of good faith and fair dealing. The court of appeals determined, as a matter of law, that even accepting petitioner's factual allegations, no breach of that duty had occurred. Pet. App. 19a-26a. The court therefore did not abuse its discretion in declining to order a remand, nor would that

case-specific issue warrant this Court's review in any event.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

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* *Amici* Federal Timber Purchasers, et al., assert (Br. 7) that the decision below will result in lower prices and reduced competition for future timber sales because it grants the Forest Service "almost total immunity" for suspensions that result from environmental litigation. That argument overlooks that the court of appeals simply gave effect to the plain language of petitioner's contracts, which expressly allocated the risk of any disruption that such litigation might cause. Pet. App. 19a-21a (applying CT 6.01). In any event, the suggestion that the decision below represents a dramatic change is unfounded. Clause CT 6.01 has been in use for nearly 20 years, *id.* at 5a, 41a, and the Federal Circuit previously applied it in *Scott Timber*, see 333 F.3d at 1366. The decision below properly respects and enforces the bargains struck between petitioner and the Forest Service.

DEC 28 2010

No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

As stated in the petition, Petitioner Precision Pine & Timber, Inc., makes the following disclosures:

There are no parent corporations or any publicly held companies owning 10% or more of Petitioner's stock.

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REPLY

Disappointingly, in its Brief in Opposition ("Opposition" or "Opp.") to Precision Pine & Timber, Inc.'s ("Precision") Petition for a Writ of *Certiorari* ("Petition" or "Pet."), the government has not been forthright with this Court in its treatment of the following issues:

1. The government argues that "[a]t all times the suspensions were necessary to comply with the district court's order. . . ." Opp. 6.

This statement, although literally true, also wholly ignores the pivotal point in this case that: (1) the district court's order enjoining the Forest Service from permitting on-the-ground activities in the National Forests of Arizona and New Mexico until it fulfilled its consultation obligation under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and (2) the resulting suspension of Precision's 14 timber sale contracts for consultation were both the direct result of the Forest Service's steadfast refusal, for a period of years, to comply with its well-established legal obligations to consult. Pet. 3-4. Indeed, well before the district court issued its order, the Department of Justice ("DOJ") advised the Forest Service that defending the agency's longstanding refusal to abide by binding Ninth Circuit precedent requiring consultation in the circumstances here present could subject DOJ lawyers to Rule 11 sanctions. Pet. 6

As the trial court correctly held, under Federal Circuit precedent the Forest Service's actions in causing, and then prolonging, the suspensions for a total of 467 days were unlawful and wholly

unreasonable and therefore breached 11 of Precision's contracts. Petitioner's Appendix ("Pet.App.") 8a. Moreover, both the district court's order directing the Forest Service to consult and the resulting suspension of Precision's contracts during consultation were entirely avoidable had the Forest Service simply complied with the law years earlier as its lawyers had advised.

2. The government argues that "[T]he sovereign acts doctrine has no relevance here because the court of appeals in this case did not address it, much less establish a new defense based on it." Opp. 5.

The government's statement is simply not true. In *Precision Pine*, the Federal Circuit relied on two cases, *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide Bank v. United States*, 431 F.3d 1342 (Fed. Cir. 2005), in which the issue had been whether the government could avoid liability for breaching the contracts because the breaches had been caused by the government in its sovereign capacity. Pet.App. 23a. In both cases, the Federal Circuit concluded that Congress' enactment of the Guarani Legislation, *i.e.*, the putative sovereign act, was specifically targeted at the plaintiffs' contract rights and thus did not constitute a sovereign act. Accordingly, the government was held to have breached the implied covenant of good faith and fair dealing by eliminating a material part of the contract's consideration. *Id.*

Even though in the instant case, as the government acknowledges, it did not raise the sovereign acts defense to Precision's claim that the Forest Service

had breached its contracts (Opp. 5), the Federal Circuit nevertheless extracted from *Centex* and *First Nationwide* the basic elements of the test for determining whether the government's actions that breached the contracts were taken in a sovereign capacity and applied them, stating:

> We conclude that there was no breach of the of the government's implied duty of good faith and fair dealing because the Forest Service's actions during these formal consultations were (1) not "specifically targeted," and (2) did not reappropriate any "benefit" guaranteed by the contracts, since the contracts contained no guarantee that the [sic] Precision Pine's performance would proceed uninterrupted.

Pet.App. 23a.[1] The quoted language is the first prong of the test used by the Federal Circuit in *Centex* and *First Nationwide* to determine whether or not the government could avoid breach of contract liability based on the sovereign acts defense.[2] Indeed, other

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[1] The Federal Circuit's reference to the "implied duties of good faith and fair dealing" is potentially misleading. Throughout the proceedings below, Precision actually alleged violations of the government's related duties to cooperate and not to hinder its performance. Pet. 8. It is well-established that, to demonstrate a violation of any of these duties a contractor need not show that the government acted in "bad faith" or with malice toward its contracting partner, but only that the government's actions were commercially unreasonable (Pet. 10-11), something that Precision readily demonstrated here.

[2] The Federal Circuit in *Precision Pine* ignored the fact that, for a sovereign act (*i.e.*, a proper and legal governmental action that is not specifically targeted at the contract in issue) to absolve the

than *Precision Pine*, the government identifies no case that did not involve the application of the sovereign acts defense in which a court inquired into whether the government's actions were "specifically targeted" at the plaintiff's contracts.

In this regard, the government also ignores Precision's reliance on the fact that Professor Emeritus Ralph C. Nash, Jr., a pre-eminent authority on government contract law, has described *Precision Pine* as having created a new, "mini-sovereign acts" defense. *See* Ralph C. Nash, Jr., "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 No. 5 Nash & Cibinic Rep., ¶ 22 (May 2010).

3. The government asserts that the Federal Circuit held that "the decision below does not conflict with *Scott Timber*." Opp. 5. ("Our conclusion is consistent with this court's decision in *Scott Timber Co. v. United States*, which similarly concerned the government's obligations arising out of timber contracts between the Forest Service and a private party"). *See* Pet.App. 17a.

The government's contention is extremely disingenuous. The "conclusion" being discussed by the

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government of liability for breach, the government must also demonstrate that the common law test for impossibility of performance has been met. *See United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality); RESTATEMENT (SECOND) OF CONTRACTS § 261. Pet. 10-16. The government, in its briefing to this Court, ignores Precision's contention that the test as applied by the Federal Circuit runs afoul of this aspect of the Court's teaching in *Winstar*.

Federal Circuit in the passage quoted by the government was not made with respect to Precision's claim that the Forest Service had breached its implied contractual duties to cooperate and not to hinder. On the contrary, the Federal Circuit's "conclusion" dealt solely with its concurrence with a portion of the holding in *Scott Timber* that the language of standard contract clause CT6.25 did not create an implied warranty.[3] This is made abundantly clear in the sentence that follows the quote upon which the government relied: "*Scott Timber* held that an identically-worded provision (C6.25) did not create a warranty 'as to any measures actually taken.'" Pet.App. 17a. This aspect of *Scott Timber* is not relevant to whether the Forest Service's suspension of a timber contractor breached the Forest Services implied duties to cooperate and not to hinder.

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[3] Although Precision also disagreed with the Federal Circuit's reversal of the trial court's ruling that the government had breached an implied contractual warranty, Precision elected not to appeal that ruling. Notably, however, the Federal Circuit's recent rulings relieving the government from implied contractual duties that have been routinely applied to it (and private contractors) is also at issue in *Agredano v. United States*, Supreme Court No. 10-99 (Pet. for Cert. pending). Unless addressed by this Court, these rulings will continue to embolden the government to take unreasonable actions to the commercial detriment of its contracting partners.

4. The government also asserts that the Federal Circuit's decision is consistent with the holding in *Scott Timber*. Opp. 6.[4]

In this argument the government fails to explain how the long-standing reasonableness standard for assessing whether there has been a breach of the implied contractual duties to cooperate and not to hinder can be squared with the Federal Circuit's adoption of a new standard in *Precision Pine*. The new standard rejected ample proof of objectively unreasonable conduct that had been adequate to establish a breach of contract for decades, and substituted a hitherto unknown standard requiring proof that the government's actions were "specifically targeted" at the contractor and "reappropriated" a contractual benefit. The reason that the government fails to address this point is because the standards, one of which is objective and the other of which is subjective, are wholly inconsistent with one another. As Professor Nash has explained, in *Precision Pine*, the Federal Circuit "has articulated a standard . . . which flies in the face of almost all prior decisions." 24 No. 5 Nash & Cibinic Rep., ¶ 22. Indeed, by applying this new standard, the Federal Circuit was able to conclude that, although certain actions taken by the Forest Service after the district court ordered it to consult violated that order and prolonged the suspension (Pet. App. 22a), even such "misbehavior" did not constitute a breach of the implied duties to

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[4] In support of its view, the government only refers to the Forest Service's need to comply with a court order. *Id.* Once again, however, the government ignores the fact that the Forest Service's failure to comply with its obligations under environmental law caused the suspension in the first place. *See* point 1 *supra*.

cooperate and not to hinder performance. Such a conclusion would not have been possible had the court applied the objective reasonableness standard that was applied in *Scott Timber*.

The insincerity of the government's assertion that the Federal Circuit's decision in *Precision Pine* is consistent with its decision in *Scott Timber* is laid bare by a recent DOJ filing. In *Zip-O Mills, Inc. d/b/a Zip-O Timber Co. v. United States*, Court of Federal Claims No. 04-1123C, the DOJ is defending the Forest Service against an action for the breach of a timber sale contract by arguing that *Precision Pine* stands for the proposition that "the timber purchaser could not maintain a breach claim *based upon an unreasonable suspension* where the Forest Service was authorized to suspend performance under CT6.01(b) in order to comply with a court-ordered injunction." *See id.*, Dkt. No. 87 at 9 (emphasis added).[5] The holding in *Scott Timber*, which is supported by decades of Federal Circuit precedent, is diametrically opposed to allowing

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[5] In fact, two of the lawyers who filed the government's Opposition in this Court also were listed as counsel on the filing in the *Zip-O* case at the Court of Federal Claims. Thus, these inconsistent positions are not the result of one arm of the DOJ not being aware of what the other is doing. Moreover, in arguments made to this Court in *General Dynamics Corp. v. United States*, Supreme Court Nos. 09-1298, 09-130 (Pet. for Cert. granted), the government also relies on the Federal Circuit's decision in *Precision Pine* in an attempt to absolve itself of liability for breach of contract should this Court find that the Federal Circuit's opinion in *General Dynamics* should be remanded. *See Id.* Government's Brief at 53. This is further evidence of the government's effort to expand the pernicious effect of the Federal Circuit's incorrect ruling in *Precision Pine*.

the government to act in an unreasonable manner with impunity as the court has done in *Precision Pine*.

Simply put, the government cannot square the circle of the plain contradiction between *Scott Timber's* holding that, for a suspension under C[T]6.01 not to violate the implied duties to cooperate and not to hinder, it must be "reasonable," and *Precision Pine's* holding that, even an indisputably unreasonable suspension accomplished under the very same contract provision, does not breach those duties unless the agency's actions, even if admittedly unlawful, are also "specifically targeted" at the contractor and "reappropriated" the benefits of the contract.

5. The government asserts that "[a]ny inconsistency between decisions of the Federal Circuit [in *Scott Timber* and *Precision Pine*] would not be a basis for this Court's review" because the inconsistency is merely an intra-circuit split. Opp. 5.

The government's assertion ignores the argument set forth in the Petition at 2 n.1:

> Where [as here] the Federal Circuit has been given essentially exclusive jurisdiction over an area of the law that is of special importance to the entire Nation (such as the law of government contracts), a grant of *certiorari* is particularly warranted. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

This Court's one-page ruling in *Wisniewski v. United States*, 353 U.S. 901 (1957), relied upon by the government, is not to the contrary. In *Wisniewski*, the

Court declined to accept a question that had been certified by the Eighth Circuit in order to resolve a divergence of opinion between two panels of that court regarding application of a federal regulation. *Id.* Naturally, the interpretation of that regulation could readily have been the subject of decisions by other circuit courts and thus have reached this Court based on a spilt between circuits. That is not possible with regard to matters within the exclusive appellate jurisdiction of the Federal Circuit. Due to the nation-wide effect of Federal Circuit decisions, such splits, which cannot be tempered in any way by decisions from other circuits, can be particularly disruptive. Pet. 20 n.20. Because the Federal Circuit has exclusive jurisdiction over several important areas of law, including the law of government contracts, splits between panels of the Federal Circuit, not remedied by a rehearing *en banc*, such as in the instant case, are particularly appropriate for this Court's review.[6]

> 6. The government argues that "Petitioner identifies no case that suggests that the [Federal Circuit's] decision conflicts with the 'accepted common law standards' of good faith and fair dealing that apply in any other circuit." Opp. 7.

The government's contention misses the mark because Petitioner did cite several cases in addition to *Scott Timber* that are binding in the Federal Circuit, as well as several treatises, all of which apply a

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[6] As this Court is certainly aware, a Petition may also be granted on the basis that it presents an important question of federal law or for any other "compelling reason." Supreme Court Rule 10.

reasonableness test to an alleged breach of the implied contractual duties. Pet. 10-12. Federal common law, which is applied by the courts and boards in government contract cases, has uniformly used the same reasonableness test in assessing breaches of the government's implied duties. *Id.* These authorities were discussed in the Petition but ignored by the government. Pet. 20-26, 31-32. Moreover, the consistent application of the reasonableness standard has directly benefited the government:

> Contractors selling supplies and services to the Government have traditionally priced such supplies and services on the basis that the law will protect them from unreasonable conduct by the Government during the performance of the contract. This belief has been fostered by decades of decisions by the boards of contract appeals and the courts granting equitable adjustments, price adjustments or damages when the Government does not meet this reasonableness standard. The Government has been the major beneficiary of this traditional view in the fact that, while it has occasionally been required to pay additional compensation to a contractor, it has obtained lower prices on many, if not most, of its procurements.

24 Nash & Cibinic Report, ¶ 68. The *Precision Pine* ruling, if not reversed, will likely increase government costs as contractors factor a contingency into every bid for the risk that the government can escape liability for failing to act reasonably even to the point of willful

non-compliance with its own pre-award environmental legal obligations.[7]

CONCLUSION

> It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

State of the Union Address (1861) Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). These words of President Abraham Lincoln, which led Congress to create the predecessor to the Court of Federal Claims and the Federal Circuit Court of Appeals, are etched prominently in marble on the building that houses these two courts today. Unfortunately, the government's failure to forthrightly address the central issues presented in the Petition threatens to render President Lincoln's promise of justice meaningless in the context of commercial transactions with the government. The Federal Circuit's ruling in *Precision Pine*, if allowed to stand, will disrupt the settled expectations of government contractors nationwide, who rightfully anticipate commercially fair and reasonable treatment by their government.

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[7] The severe impacts that will flow to timber sale contractors and, indeed, to all government contractors, is set forth persuasively in the Brief of Amici Curiae, *Federal Timber Sale Purchasers, et al.*, that has been filed in this matter. For the views of a prominent practitioner of government contracts law, *see also* Feature Comment "Fed. Cir. Resets Standard For Breach Of The Duty To Cooperate And Not To Hinder," 52 Government Contractor ¶ 97 (Mar. 18, 2010).

The government's failure to squarely address the significant issues raised in the Petition has done a disservice to this Court, the community that contracts with the government, and the taxpaying public.

For the reasons noted herein and raised previously, the Court should grant the Petition.

Respectfully submitted,

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No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF FEDERAL TIMBER PURCHASERS COMMITTEE, THE AMERICAN FOREST RESOURCES COUNCIL, CALIFORNIA FORESTRY ASSOCIATION, INTERMOUNTAIN FORESTRY ASSOCIATION, MINNESOTA FOREST INDUSTRIES ASSOCIATION, AND BLACK HILLS FOREST RESOURCES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The timber trade associations participating as *amici*, as discussed below, represent virtually every company in the United States that regularly bids on United States Forest Service timber sale contracts and are therefore uniquely qualified to discuss the implications of the Court of Appeals for the Federal Circuit's ruling in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). Amici believe that their brief will assist the Court in fully understanding the issues in this case, and will assist the Court in appreciating the consequences that will likely flow from the application of the Federal Circuit's decision, both to timber purchasers and even to the wider community contracting with the Government. *Amici's* interest in this case arises from a concern regarding the Federal Circuit's ruling, which sets a new, heightened standard for proving breach of the implied duty of good faith and fair dealing.

The Federal Timber Purchasers Committee ("FTPC") is a national organization composed of companies that regularly bid on Forest Service timber sale contracts and regional associations to which many of these companies also belong. Founded 50 years ago

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[1] The parties have consented to the filing of this brief. Counsel for all parties have been given 10-days' notice of the intention of the *amici curiae* to file their brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

at the behest of the Secretary of Agriculture, FTPC is the principal liaison between the companies that bid on and perform timber sale contracts and the Forest Service on contract-related matters.

The American Forest Resources Council ("AFRC") is an association that represents nearly 80 forest product manufacturers and forest land owners – from small, family-owned companies to large multi-national corporations – in twelve Western states. AFRC's member companies regularly bid on and perform Forest Service timber sale contracts.

The California Forestry Association ("CFA") is a Sacramento, California-based forest industry advocate. CFA's diverse membership includes biomass energy producers, environmental consultants, financial institutions, forestland owners, forest products producers, loggers, registered professional foresters, wholesalers, retailers, and wood products manufacturers. Many of CFA's members regularly bid on and perform Forest Service timber sale contracts.

Intermountain Forestry Association ("IFA") is an Idaho-based forest industry advocate that was established in 1973. IFA represents companies throughout the Intermountain West, including Colorado, Wyoming and Idaho. IFA's member companies regularly bid on and perform Forest Service timber sale contracts.

Minnesota Forest Industries Association ("MFIA") is an association representing eight forest industry members located primarily in Minnesota. Many of MFIA's members regularly bid on and perform Forest

Service timber sale contracts. MFIA is based in Duluth, Minnesota.

Black Hills Forest Resource Association ("BHFRA") is a non-profit trade association of forest products manufacturers, forestry and timber harvest professionals, and citizens. Headquartered in Rapid City, South Dakota, the trade association focuses primarily on forest management policies pertaining to the Black Hills National Forest in South Dakota and Wyoming. BHFRA's members regularly bid on and perform Forest Service timber sale contracts.

SUMMARY OF THE ARGUMENT

There is a delicate legal relationship between the Government and the firms that purchase timber from federal forestlands, mainly the National Forests managed by the Forest Service. This Federal Circuit decision upsets this relationship, and throws the law of government contracts into a state of uncertainty.

Prior to this decision, timber contractors could expect that the Forest Service might interrupt their ability to harvest the timber while the Forest Service took steps necessary to comply with its environmental obligations arising after contract award. However, contractors could also expect that in the event that the Forest Service itself did not act reasonably and caused timber harvests to be interrupted because, prior to award, it had failed to meet its environmental obligations and/or caused the interruption through its own wrongful conduct in complying with those obligations, the law would see this as a breach of the contract and therefore the Forest Service would be liable for the resulting losses. Such conduct breaches

the Forest Service's implied duty to cooperate and not do anything to hinder the other party's performance of the contract, which is an aspect of the duty of good faith and fair dealing and is inherent in every contract.

The Federal Circuit decision robs the timber contractors of the expectation of commercially reasonable conduct by its contracting partner. This decision, which has stunned both the timber industry and the government contract bar, frees the Forest Service of any liability for breach of its implied duties, even where the agency caused a suspension by wrongfully failing to meet its statutory duties and/or by unreasonably prolonging a suspension. In these circumstances, the Federal Circuit held for the first time that to establish a breach of contract, the contractor would have to show that the Forest Service's misconduct was "specifically targeted" at depriving the contractor of a benefit under the contract. Proof of such intentional conduct would be a rare occurrence. The Federal Circuit's decision eliminated a key protection for timber contractors from objectively unreasonable government conduct that binding Federal Circuit case law has consistently honored in numerous cases, especially in *Scott Timber Co. v. United States*, 333 F.3d 1358, 1368-70 (Fed. Cir. 2003), a timber contract case with quite similar facts.

This decision totally disregards both fundamental fairness and the realities of timber sale contracting. If allowed to stand, it will have the unintended result of decreasing Government revenues and increasing the Government's cost of managing National Forests.

Moreover, the Federal Circuit announced this new, heightened standard for holding the Government liable

sua sponte, as neither the Petitioner nor the Government even discussed such a standard in its briefing or argument to the Federal Circuit. Because review of government contracts decisions is lodged almost exclusively with the Federal Circuit, it is virtually certain that this extraordinary decision will not come before this Court as a case in conflict with a different Circuit.

Additionally, when the Federal Circuit announced its new standard, it did not remand the case to a lower court for development of a factual record under the never-before-applied new standard. The Federal Circuit decision is fundamentally unsound and deserves to be reviewed by this Court.

ARGUMENT

I. The Federal Circuit's Ruling Will Likely Have the Unintended Consequence Of Decreasing National Forest Revenue from Timber Sales and Significantly Increasing The Government's Cost Of Managing The National Forests

Congress established the Forest Service in 1905 to manage the National Forests and provide quality water and timber for the Nation's benefit.[2] At present, there are 155 National Forests comprising some 193 million acres, which is an area the size of Texas. Id. Over the years, Congress has further directed the Forest Service to manage National Forests for

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[2] *See*, http://www.fs.fed.us/aboutus/meetfs.shtml (last visited October 6, 2010).

multiple uses such as water, range, wildlife, timber, and recreation. Id. Multiple use means managing resources under the best combination of all of these uses to benefit the American people. *Id.*

One of the principal tools used by the Forest Service to promote and protect all of these uses is the harvesting of timber which, among other things, thins the forests and thereby reduces the risk of insect infestation, which can arise in dense stands of trees, and catastrophic wildfires that are fueled by overcrowding. *See generally* Government Accountability Office (GAO), "Update on Merchantable Timber Contracting Pilot Program," GAO-09-23, at 12 (March 4, 2010). This work is generally accomplished by the Forest Service's awarding competitively bid timber sale contracts that require the contractor to remove designated trees within a set time period (typically three years) pursuant to detailed specifications. However, rather than being paid by the Government for these services, under a timber sale contract the contractor pays the Government for the timber harvested, plus an amount to fund replanting. Because the vast majority of bidders on federal timber sale contracts are sawmill owners, timber harvested pursuant to such contracts constitutes a valuable source of raw material to supply the bidder's mill where it is manufactured into various lumber products such as 2 x 4's, 2 x 6's, etc.[3] Indeed, in many localities, Forest Service timber sales make up a very substantial

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[3] Those bidders that do not own sawmills are generally loggers who sell the timber harvested pursuant to their timber sale contract to the local sawmill.

part of the available timber supply because a large percentage of the land base is federally owned.

As the Forest Service recognizes, the continued existence of sawmills in proximity to the National Forests is very important to the Forest Service's ability to continue managing the forests at a reasonable cost. *See*, *e.g.*, 74 Fed. Reg. 40,736, 40,739 (Aug. 13, 2009) (Forest Service indicated that actions were needed to prevent the loss of timber industry infrastructure because, without it, management of the National Forests would have to be accomplished with service contracts pursuant to which the Forest Service pays the contractor for removing trees).

The Federal Circuit's decision allows the Forest Service almost total immunity from liability for interfering with its own ability to perform due to its own willful failures to comply with environmental laws. The ruling also shifts the financial consequences of unreasonable agency conduct such as this to timber sale contractors that in the main cannot shoulder those consequences.[4]

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[4] As the government contract bar has already warned, the Federal Circuit's decision appears likely to have a similarly adverse effect on other government contractors. *See*, *e.g.*, Ralph C. Nash, "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 Nash & Cibinic Report, No. 2 (May 2010). (The Federal Circuit "has articulated a standard in ruling on a timber sales contract which flies in the face of almost all prior decisions. The troublesome language in the decision bodes ill for Government contractors.") (citation omitted). *Accord*, Daniel P. Graham et al., "Feature Comment: Fed. Cir. Resets Standard For Breach of the Duty to Cooperate and Not to Hinder," 52 GOVERNMENT CONTRACTOR ¶ 97 (Mar. 18, 2010). (The Federal Circuit's ruling

Allowing the Forest Service to act unreasonably, prevent its own ability to perform its contractual obligations for an indefinite period, and then avoid liability for the resulting damages is also contrary to a timber contractor's reasonable expectation. Each bidder for a Forest Service timber sale contract anticipates that if awarded the contract, with limited exceptions, he will be able to harvest the timber under contract in the time frame provided and that if the Forest Service unreasonably prevents him from doing so, then it will be liable for the resulting damages.[5] Indeed, part of every bidder's reasonable expectation is that the Forest Service has done what it said it would do, *i.e.*, "take[n] every precaution before authorizing a particular activity on National Forest System lands to ensure that its authorization conforms with existing laws and with existing conditions on the ground at the time of the authorization." 69 Fed. Reg. 37,243 (June 28, 2004); 55 Fed. Reg. 35,683, 35,685 (Aug. 31, 1990). By refusing to consult when the Mexican spotted owl was listed, as required by the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, the Forest Service certainly did not "ensure that its authorization conform[ed] with existing laws" for

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"will likely excuse a variety of objectively unreasonable conduct. . . .").

[5] The Federal Circuit nevertheless reasoned that the Forest Service's actions did not deprive Precision Pine of any benefit contained in its contract because Precision Pine had no reasonable expectation of uninterrupted performance. *Precision Pine,* at 596 F.3d 831. Given the existence of standard clauses such as suspension of work, the same incorrect reasoning could apply to most government contracts. Nash, *supra*, note 4.

the 10 sales awarded to Precision Pine after the listing.

As the trial court recognized, a prolonged suspension of a timber sale contract can result in the contractor's loss of substantial profits from the sale of the lumber manufactured from the timber on the suspended contract, *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 484 (2006), *i.e.*, profits that cannot be recouped even when the timber is harvested after the suspension is lifted. *Id.* at 487-88. Given the huge investment in plant and equipment that a mill owner makes, the vagaries of the market for lumber products produced from the timber it harvests and the current economic downturn (particularly in housing construction) which has lumber product prices near historic lows, few companies can survive a lengthy, uncompensated Forest Service suspension that disrupts the flow of raw material to their mill.

The possibility of not being compensated for suspensions caused by the Forest Service and the resulting recognition (given the Federal Circuit 's ruling) of the illusory nature of the Forest Service's contractual obligations will undoubtedly cause some companies to stop bidding on Forest Service timber contracts – something that will hurt the taxpayers in two ways. First, as the Forest Service knows, a reduction in the number of bidders on Forest Service timber sales will likely result in decreased (or even no) competition and bid prices that are less favorable to the Government. *See generally* 74 Fed. Reg. at 40,739 (due to reduced competition, federal revenue from

timber sales will decline).[6] Moreover, as discussed above, a decrease in the number of viable timber sale contractors will require the Forest Service to pay contractors to remove timber in some situations where the Government is presently receiving these services as well as cash payments from its existing contractors.

II. Through Deliberate and Unreasonable Actions That Made Its Own Performance Impracticable, the Forest Service Did Double-Cross Precision Pine

Although the Federal Circuit failed to recognize it, by its failures to comply with the law, the Forest Service did double-cross Precision Pine. That is, prior to award, the Forest Service knowingly failed to do what was required of it by the ESA as a precondition to its performance of the contracts, and then, after award, suspended performance to comply with the very obligation that it refused to perform prior to award. Contrary to the decision of the Federal Circuit, the case law is clear that, where an agency's deliberate and unreasonable actions make its own performance impracticable, it should not be excused from breach liability. *See, e.g., Chalender v. United States*, 119 F. Supp. 186, 190 (Ct. Cl. 1954) (even in the absence of a specific warranty, an unreasonable delay attributable to the Government is a breach of the obligation not to hinder the performance of the other party); *O'Neill v. United States*, 231 Ct. Cl. 823, 825-26 (1982). *See also*

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[6] Even companies that continue to bid on Forest Service timber sale contracts will have to reflect the new risk that the Federal Circuit's decision thrusts upon them by bidding less for Forest Service timber. Nash, *supra*, note 4.

RESTATEMENT (SECOND) OF CONTRACTS § 264, Prevention by Governmental Regulation or Order, cmt. b ("a party who seeks to justify his non-performance under this Section must have observed the duty of good faith and fair dealing imposed by § 205 in attempting, where appropriate, to avoid its application").[7]

Notwithstanding the public purpose of protecting listed species that underlies the ESA consultation process, here, for years the Forest Service deliberately refused to take actions to further that purpose. "[L]ike any other contracting entity, the United States must suffer the consequences of poor, albeit informed choices." *Temple-Inland, Inc. v. United States*, 59 Fed. Cl. 550, 560 (2004) (footnote omitted). *See also*, *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1359 (2009). As noted, the Forest Service, knowing that the ESA required it to consult, not only refused to do so but continued to award timber sale contracts as usual.[8] *Precision Pine & Timber, Inc. v.*

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[7] The above notwithstanding, the Federal Circuit excused the Forest Service from liability for its unreasonable actions by crafting a hitherto unknown "mini-sovereign acts doctrine," the future application of which is uncertain at best. Nash, *supra*, note 4. Moreover, in doing so, the Federal Circuit ignored the requirements for applying the sovereign acts doctrine set forth in *United States v. Winstar Corp.*, 518 U.S. 839, 891-92 (1996). It also ignored the general rule that "where the contracting agency breaches an implied obligation, generally the [sovereign acts] doctrine will not afford protection." Ronald G. Morgan, IDENTIFYING PROTECTED GOVERNMENT ACTS UNDER THE SOVEREIGN ACTS, 22 Pub. Cont. L.J. 223, 258 n.173 (1993).

[8] Moreover, despite knowing that performance of every one of its timber sale contracts was suspended until consultation was

United States, 50 Fed. Cl. 35, 50 (2001). By allowing the contracting agency almost total immunity from liability for causing its own inability to perform even were that inability is rooted in the agency's willful failure to comply with its duties under environmental laws, the Federal Circuit's decision removes a substantial check on agency non-compliance with its statutory environmental obligations.[9] Removing this disincentive certainly does nothing to benefit listed species or the environment, nor will it give agencies any reason in the future to avoid extreme recalcitrance of the sort exhibited by the Forest Service here. Rather, conduct that constituted a willful violation of the environmental laws and required a federal court to compel agency compliance has now been exonerated by the Federal Circuit. It is difficult to perceive any common sense reason why the Forest Service's wholly unreasonable conduct should exempt the agency from breach liability in these circumstances. *See*, Ralph C. Nash, Jr., The Government Contracts Decisions of the Federal Circuit, 78 Geo. Wash. L. Rev. 586, 614 (April,

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completed, something for which the ESA provided only a 135-day time frame, 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(e) (1995), the Forest Service hardly chose to move with all deliberate speed to complete consultation. In this sense, the Forest Service also double-crossed Precision Pine by not completing consultation within the time the law required and as Precision Pine and, indeed, any timber contractor would have reasonably expected.

[9] In so finding, the Federal Circuit relied on its own ruling issued just two days earlier in *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010). Notably, plaintiffs in *Agredano* have also filed a petition for a writ of certiorari in this Court. Although the Government waived its right to file a response this Court has now requested that it do so. *See*, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-99.htm (last visited Oct. 6, 2010).

2010)("[I]t seems clear that the Federal Circuit looks at its role differently than did [its predecessor] the Court of Claims. It appears that the court does not seek to show the citizenry that the Government deals fairly with it. If this is so, we are all losers."

III. Because the Federal Circuit in *Precision Pine* Adopted a New Heightened Standard for the Petitioner's Case But Did Not Remand the Case to a Lower Court for New Factual Findings, Justice Requires a Grant of Certiorari as the Only Avenue Open to the Petitioner and the *Amici*.

The decision of the Federal Circuit in *Precision Pine* presents a compelling situation for this Court to grant certiorari. As the Petitioner has noted,[10] appeals from government contract decisions are heard by the Court of Federal Claims and the Boards of Contract Appeals, and all appeals then go solely to the Federal Circuit. *Precision Pine* does not present a conflict between Circuits, because the Federal Circuit alone hears government contract appeals. Rather, there is a profound conflict within the Federal Circuit, between *Scott Timber*, which protected the reasonable expectations of government contractors, and *Precision Pine,* which does not. This Court is the only tribunal where the Petitioner, and the timber sale contractors represented by *amici*, can seek to have this extraordinary Federal Circuit decision reviewed.

The *Precision Pine* ruling is no typical Federal Circuit contract case. As noted earlier, it has been

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[10] Petition for Writ of Certiorari, Statement of the Case, 2, n.1.

greeted with puzzlement and roundly criticized by the government contract bar.[11] It calls out for review before it becomes settled law and disrupts the status quo for government contracts not only in the Forest Service but in other government agencies as well. In Professor Nash's words, "The troublesome language in the decision bodes ill for Government contractors."[12]

A second compelling reason for this Court to grant certiorari is that the Federal Circuit took an unconventional procedural approach. After introducing this totally new standard at the Circuit level, the Federal Circuit did not remand the case to the trial court for further proceedings under the new standard. The Federal Circuit in prior cases has made it clear that a remand would be necessary here. *Walther v. Secretary of Health and Human Services*, 485 F.3d 1146, 1152 (Fed.Cir. 2007).

Thus, because the Federal Circuit did not remand the case to a lower court, Petitioner and *amici* have no place to turn but to this Court.

Finally, this Court should consider the unusual circumstances surrounding the adoption of this new standard by the Federal Circuit panel. The reason this new standard came as a surprise to the parties was that neither the Government nor Precision Pine had suggested the new standard in its briefing or argument. This was noted in the analysis of the decision in the journal Government Contractor:

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[11] Note 4, *supra*.

[12] Nash, *supra*, note 4.

> Rather, both parties discussed at length *Scott Timber Co.*, which expressly applied the traditional reasonableness standard to the very contractual provision at issue in *Precision Pine*. The Government's argument on appeal was that the COFC failed to apply the evidentiary presumption of good faith and fair dealing. The Government appeared to acknowledge that the ultimate standard was reasonableness. The panel, however, did not reverse the COFC [Court of Federal Claims] based on the failure to apply an evidentiary presumption, but instead articulated a new standard with respect to the ultimate question of breach, without addressing *Scott Timber*'s earlier treatment of the same issue.[13]

These are all factors that, taken together, mark this case as unique. For justice to occur under these special circumstances, it is appropriate and necessary for this Court to grant a writ of certiorari.

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[13] Graham, et al., *supra* note 4.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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